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No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1984

R. C. LYNNE, Executor and Personal Representative of the Estate of JIMMY SHERMAN LYNNE, Deceased; MISSIONARY AVIATION FELLOWSHIP, INC.; DONNA LYNNE, Individually and as Parent and Next Friend of KEVIN LYNNE and KURTIS LYNNE, Minors,

Petitioners,

versus

AUSTRALIAN GOVERNMENT AIRCRAFT FACTORIES and THE COMMONWEALTH OF AUSTRALIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the survivors of an American killed abroad in a plane crash allegedly caused by the negligence of a foreign state engaged in a commercial activity has sustained a "direct effect" in the United States sufficient to satisfy the "direct effect" exception to foreign sovereign immunity of the Foreign Sovereign Immunities Act.

2. Whether an American corporation which lost an airplane abroad in a plane crash allegedly caused by the negligence of a foreign state engaged in a commercial activity has sustained a "direct effect" in the United States sufficient to satisfy the "direct effect" exception to foreign sovereign immunity of the Foreign Sovereign Immunities Act.

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AUSTRALIAN GOVERNMENT AIRCRAFT FACTORIES and THE COMMONWEALTH OF AUSTRALIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

This petition seeks review of the decision of the United States Court of Appeals for the Ninth Circuit which held that the "direct effect" clause of § 1605(a)(2) of the Foreign Sovereign Immunities Act of 1976 did not encompass either the wrongful death injuries or the property damages suffered in the United States by petitioners as the result of an airplane crash in Indonesia and thus did not allow suit against the defendant state, Australia, in the courts of the United States. *Australian Government Aircraft Factories v. Lynne*, 743 F.2d 672 (9th Cir. 1984). (See Appendix A)

Petitioners' suit was originally instituted in the United States District Court for the Central District of California. The question of the court's subject matter jurisdiction was raised by respondents' motion to dismiss the complaint, which motion was denied by the district court in an opinion filed June 24, 1983. (See Appendix B)

Appeal was taken to the United States Court of Appeals for the Ninth Circuit which reversed the district court. Petitioners filed their Suggestion for Rehearing En Banc on October 9, 1984, which Suggestion has not yet been ruled upon. No Petition For Rehearing was filed.

JURISDICTION

The decision of the Court of Appeals was rendered on September 21, 1984. This petition was filed within 90 days of the date the Court of Appeals entered judgment as per 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Because of the length of the statute involved herein, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391(f), 1602 *et seq.*, that Act is set out as Appendix C.

STATEMENT OF THE CASE

On July 23, 1979, a Nomad 22B aircraft piloted by Jimmy Lynne crashed somewhere near Langda Mission in Irian Jaya, Indonesia. The pilot was killed and the plane destroyed as a result of that crash. Petitioners in this cause are the surviving family of Jimmy Lynne and the executor of his estate, as well as the Missionary Aviation Fellow-

ship, Inc., ("MAF") owners of the aircraft. The individual petitioners are all citizens of Ohio and of the United States, and MAF is a nonprofit California corporation that provides air transportation and radio services for missionary programs to developing nations.

Respondent Australian Government Aircraft Factories ("GAF") is in the business of making airplanes. GAF is wholly owned by the Australian government and produces both military and civilian aircraft, which it sells throughout the world.

GAF leased and later sold to MAF the Nomad 22B aircraft which crashed on July 23, 1979.

The Petitioners brought a negligence and strict products liability action against GAF and the Commonwealth of Australia in the Central District of California. This suit, filed July 22, 1980, alleged that the defendants were liable for defects in the design, manufacture, testing, inspection, sale, and service of the aircraft. Lynne's survivors sought damages for wrongful death, and MAF claimed damages for the loss and destruction of the aircraft.

Respondents GAF and the Commonwealth of Australia resisted maintenance of this suit on the grounds that they were immune from suit under the doctrine of sovereign immunity. In particular, the respondents argued that none of the exceptions to immunity codified in the Foreign Immunities Act of 1976 ("FSIA"), 28 U. S. C. § 1602 et seq., applied to the facts of the present action. On this basis, it was claimed that the United States District Court for the Central District of California lacked both subject matter and personal jurisdiction over the defendants. The defendants alternatively argued that venue was improper in that district court and suggested transfer to the United States District Court for the District of Columbia. All of these

arguments were advanced by means of a motion to dismiss the complaint filed April 27, 1981.

The motion to dismiss was denied on all grounds on June 24, 1983. The Order and Memorandum Opinion (hereafter "Mem. Op.") fully addressed the sovereign immunity question and concluded that the decision to exercise jurisdiction in this cause "gives effect to the spirit and intent behind Congress' enactment of the FSIA." (Mem. Op. 2). Specifically, the district court concluded that the third listed exception to immunity of section 1605(a) (2) was applicable on the facts of this case. That section provides, in pertinent part, that "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the action is based upon an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." The district court held that the wrongful death damages suffered by the survivors of Jimmy Lynne in the United States and the property damages sustained by MAF in the United States were "direct effects" of an act (the plane crash) outside the territory of the United States (in Indonesia) in connection with the commercial activity of the foreign state elsewhere (the allegedly defective manufacture, sale, and servicing of the airplane). (Mem. Op. 22-23).

Appeal was taken to the United States Court of Appeals for the Ninth Circuit. That Court reversed in an opinion entered September 21, 1984. It held that "the alleged injury here was not a sufficiently direct effect for the assertion of subject matter jurisdiction... [T]he direct injury to the American interest in this case occurred overseas where the loss of the plane took place." *Australian Government Aircraft Factories v. Lynne*, 743 F.2d 672, 675 (9th Cir. 1984).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This petition presents two questions of statutory interpretation under the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. § 1602 et seq. They are, in their simplest form: did the Lynnes suffer a "direct effect" in the United States from the death of J. C. Lynne in Indonesia, and did Missionary Aviation Fellowship, Inc. suffer a "direct effect" in the United States from the crash of its airplane in Indonesia? No issue concerning the "direct effect" clause has been previously addressed by this Court. The Courts of Appeal which have ruled on the issue are in conflict. And the questions, concerning the amenability of foreign sovereigns to suit in the courts of the United States and of the States, is of the highest importance.

It is the position of the petitioners that the Ninth Circuit has erred in its interpretation of the direct effects clause; that its opinion is in direct conflict with the position of the Second Circuit on this point; that the Second Circuit position is to be preferred; and that the question involved is of such paramount importance, touching as it does on questions of state, federal and international law, that review should be granted in order to fulfill the Congressional purpose of bringing uniformity and regularity to this sensitive area where law and foreign relations intersect.

The Foreign Sovereign Immunities Act ("FSIA") codifies, as a matter of federal law, the restrictive theory of sovereign immunity. *Verlinden B. V. v. Central Bank of Nigeria*, —— U.S. ——, 103 S.Ct. 1962, 1968 (1983). It provides that immunity is the general rule when an action is brought against a foreign state, 28 U.S.C. § 1604, subject to certain enumerated exceptions, §§ 1605, 1607. The exception

relevant to this case provides that the normal rule of sovereign immunity will not apply in suits "in which the action is based upon ... an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

The exceptions to sovereign immunity in the area of commercial activity which are embodied in § 1605(a)(2) of the FSIA are well-established and internationally recognized bases for the assertion of jurisdiction. The basic principle is that a head of state who descends into the market place must be treated like any private trader. *Dralle v. Republic of Czechoslovakia*, [1950] Int.L.Rep. 155 (Supreme Court of Austria, 1950), quoting Marshall, C.J. in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). The Restatement, Second, of the Foreign Relations Law of the United States is to the same effect: "The immunity of a foreign state does not apply to a proceeding arising out of commercial activity outside its territory..." Restatement, § 69. And this Court has recently reaffirmed that the assertion of such jurisdiction is no insult to a foreign sovereign when it deals in the commercial area. *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976).

The fact that this action is based upon the commercial activity of Australian Government Aircraft Factories ("GAF") is not in dispute. As the district court recognized, GAF is in the business of making airplanes, both military and civilian, which it in turn sells all over the world. (Mem. Op. 3). Nor is it in dispute that this action, sounding in strict products liability and negligence, is based upon an act outside of the territory of the United States in connection with the commercial activity of the foreign state elsewhere.

The only true dispute is whether the allegedly tortious conduct of the respondents which caused the death of Jimmy Lynne and the destruction of a valuable aircraft owned and operated by Mission Aviation Fellowship had a "direct effect" in the United States. Petitioners submit that, in both instances, all of the damages for which the tort is designed to provide recompense were sustained in the United States. If the conduct of GAF was in fact tortious, then it is clear that an essential, constituent element of the tort — damages — occurred in the United States. This should be considered sufficient to justify the assertion of jurisdiction pursuant to the FSIA in this case.

I.

THE NINTH CIRCUIT ERRED IN ITS INTERPRETATION OF THE "DIRECT EFFECTS" CLAUSE

Although the decision below turns on the court's interpretation of the phrase "direct effect," the Ninth Circuit did not attempt any analysis of that key phrase and simply ruled in a conclusory fashion that torts have no direct effects. 743 F.2d at 674-675. The opinion seems to assert that if a person dies, he dies, and no one who may suffer emotional damage or loss is directly affected. If a plane crashes, it crashes, and no one who suffers pecuniary loss therefrom is directly affected. Particularly regrettable is the Ninth Circuit's failure to explain its novel interpretation of direct effect in light of the district court's thorough, contrary analysis and in light of the clear legislative guide to interpretation provided by the House Report.

In contrast to the Court of Appeals, the district court realized that the issue was sufficiently complicated and disputed among the various circuits to require over sixteen

pages of carefully reasoned discussion. The district court also recognized that the wrongful death claim presented different considerations than did the property claim, while the Court of Appeals simply ruled that all direct effects of a plane crash must be located at the *locus delictus*, whether personal injury or property claims. See Mem. Op., *passim*, Appendix B.

Emphasizing the logical force of the language employed by Congress, the district court first expressed the view that the wrongful death damages suffered by the Lynnes must be considered to be direct, not indirect, effects of GAF's alleged negligence:

> Defendants' construction of "direct effect" is plagued by a logic territorial limitation. This court believes defendants' construction is arbitrary and misconceived; it ignores the real, life-shattering effect suffered by a family of a person wrongfully killed. The effect on such a family is direct no matter where the death occurred. When, as in this case, the bereaved family lives in the United States, the direct effect of the death of a father and husband occurs in the United States.

(Mem. Op. 8). This common-sense interpretation of the language of the statute, an interpretation that fulfills the statutory purpose that no change in the substantive law be effected by the adoption of the FSIA, was not addressed by the Ninth Circuit.

The district court next turned to the few authorities available on this subject. It noted that there was a conflict of authority on the question and that the cases of *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), aff'd mem., 607 F.2d 494 (D.C.Cir. 1979), and *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979), provided some support for the defendants' limited reading of the direct

effects clause in the context of a wrongful death action. However, the district court took the position, as do the petitioners herein, that these cases have been incorrectly decided and are in opposition to the intent of Congress.

The court in *Upton* also proposed to give a "common sense" interpretation to the phrase "direct effect," holding that it connoted an effect "which has no intervening element, but, rather, flows in a straight line without deviation or interruption." 459 F. Supp. at 266. The *Upton* court did not explain why the wrongful death claim of the plaintiffs in that case did not fit this simple definition. (See Mem. Op. 9) The claim of the petitioners herein should fit this definition as there is no intervening element of any sort between the airplane crash in Indonesia and the suffering and property damages realized in the United States.

The *Upton* decision, as well as the subsequent *Harris* decision, can be further faulted for their failure to distinguish between subject matter jurisdiction, to which the 'direct effects' clause relates, and the question of *in personam* jurisdiction over the defendant. Both *Upton* and *Harris* approach this question backwards. By equating the two concepts, they have concluded that since *in personam* jurisdiction was lacking[1] therefore subject matter jurisdiction

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[1]This conclusion is also suspect. Both cases drew analogy from the long-arm statute of the District of Columbia but, as the district court noted, "Most long-arm statutes have provisions granting state courts jurisdiction where tortious acts occur outside that cause injury within a state, where the defendant has minimum contacts with the state." (Mem. Op. 13). See also, Note, *Direct Effects Jurisdiction Under the Foreign Sovereign Immunity Act of 1976*, 13 N.Y.U.J. of Int'l. & Pol. 571, 597 (1981): "Rather than searching for a particular act or injury in the forum state as required by domestic long-arm statutes, courts should instead focus their analysis on the 'effect' in the United States."

was not present either under the statute. This conclusion is not sound, and the district court below was correct to point out the error and isolate the question of subject matter jurisdiction. (Mem. Op. 11-12).[2]

Other textual approaches to the interpretation of "direct effects" lead to the same conclusion, that the losses suffered by the petitioners were comprehended by the Congressional drafters of the FSIA. For example, Websters' New Collegiate Dictionary has been quoted in this context to the effect that "direct" means "marked by an absence of an intervening agency, instrumentality or influence." *Id.*, at 323 (1975), quoted in Note, *Extraterritorial Jurisdiction Over Foreign States: the 'Direct Effect' Provision of the Foreign Sovereign Immunities Act of 1976: Carey v. National Oil Corp.*, 13 J. of Int'l. L. & Econ. 633, 644, n.72 (1979). It is impossible to imagine in what respect the facts of the present case fail to conform to this definition of "direct."

Nor is there any possibility that the phrase "direct effect" was accidentally or fortuitously chosen by Congress. The House Report on this legislation states that "direct effect" was meant to embrace "commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United

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[2]The *Harris* and *Upton* cases are further distinguished by the fact that all of the actionable events in those cases took place within the territory of the foreign country. "Congress [didn't] intend to assert jurisdiction over foreign states for events occurring wholly within their own territory." Note, 13 N.Y.U.J. of Int. Law. & Pol. 571, 588 (1981). See also, Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 Col.L. Rev. 1440, 1449 (1982), for view that state will be most likely to construe exercise of effects jurisdiction "as an instrusion upon its sovereignty when the activity involved has occurred within or substantially within its own territory." The injury-producing act in the present case occurred in Indonesia, not Australia.

States consistent with the principles set forth in § 18, Restatement of the Law, Second, Foreign Relations Laws of the United States (1965)." H.R.Rep. No. 94-1487, 94th Cong., Second Sess. 6604 (1976) (hereafter "House Report"); Mem. Op. 15.

It is in interpreting the language of the Restatement that the *Harris* and *Upton* cases most obviously err. Although the Ninth Circuit relies on both of those cases, it does not repeat their error of misinterpreting the text of the Restatement; it chooses instead to wholly ignore the Congressional reference to the Restatement and the entire body of International Law on "direct effects" jurisdiction which it references. Had more attention been paid to this body of law, petitioners submit that the error embodied in the instant decision of the Ninth Circuit, and the consequent conflict between this decision and the decisions of other federal courts, could have been avoided.

Section 18 of the Restatement of the Foreign Relations Law of the United States succinctly summarizes the developed international law on the subject of jurisdiction to prescribe law based on effects within the prescribing country. International law has long recognized the fact that an effect which occurs within a country provides a basis for prescribing law. This is in addition to the more commonly encountered bases justifying the prescription of law, such as territoriality and nationality.

The modern source of effects jurisdiction is generally said to be the decision of the Permanent Court of International Justice in *The S.S. Lotus*, [1927] P.C.I.J., ser. A, No. 10, wherein it was held that extraterritorial jurisdiction could be exercised "if one of the constituent elements of the offense, and more especially its effects, have taken place there." *Id.*,

at 23. See Note, *supra.*, 13 J. of Int'l L. & Econ. at 644. The classic statement of the effects doctrine in American law is contained in the opinion of Judge L. Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945):

> [I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.

This form of extraterritorial jurisdiction is sometimes referred to as the "objective territorial principle." *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968); *Timberlane Lumber Co. v. Bank of America, N.A. & S.A.*, 549 F.2d 597, 610, n. 15 (9th Cir. 1976).

Effects jurisdiction is also recognized among the various American states and is embodied in Section 37 of the Restatement, Second, of the Conflict of Laws (1969). The comments to that section note that "a state has a natural interest in the effects of an act within its territory even though the act was done elsewhere." Comment a, p. 156.

The Restatement of the Foreign Relations Law recognizes, in section 18, two sorts of effects jurisdiction. The first, wholly applicable here, is jurisdiction based on the presence of at least one constituent element of a crime or tort in the prescribing country. The second is based on the conjunctive presence of four further factors, which factors may also be found to be present on the facts of the present case.

Effects jurisdiction under international law is summarized by the Restatement as follows:

> § 18. Jurisdiction to Prescribe with Respect to Effect within Territory

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory, and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

It is the position of the petitioners that the simple application of the plain language of the above provision, which the House Report states is consistent with the "principles" of the direct effects clause, demonstrates that the petitioners herein have a right to maintain their actions for damages in the courts of the United States, despite the claim of immunity raised by the Commonwealth of Australia.[3] This for the reason that (a) the damages suffered herein were constituent elements of the torts of negligence and strict products liability under the law of states that have reasonably developed legal systems, and/or (b) the negligence of respondents and the damages caused thereby are (i) constituent elements of the causes of action brought by peti-

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[3]The direct application of section 18 of the Restatement to resolve "direct effect" questions has been previously employed: "In view of Congress's statement, and of the not dissimilar functions of section 18 and the third clause [of § 1605(a)(2)], we consider this source of guidance a proper one." *Maritime Intern. Nominees v. Republic of Guinea,* 693 F.2d 1094, 1111 (D.C. Cir. 1982).

tioners; (ii) the effect within the United States is substantial, both in terms of monetary damages and emotional and physical injury; (iii) these damages occurred as a direct and foreseeable result of the negligent conduct outside of the United States; and (iv) the recovery of these damages is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Subsection (a) of the Restatement:

The maxim *de minimus non curat lex*, and many other similar principles of common law, have fully established the proposition that without damages there is no tort. Prosser, *Torts* § 30, p.143 (4th ed. 1971). Damages are undeniably a constituent element of any tort. All of the injuries for which the torts of negligence and strict product liability are designed to provide recompense were sustained by the petitioners in the United States. But for this element of the tort, which occurred solely in the United States, there would be no cause of action. Far from being a secondary, derivative, or, as the Ninth Circuit found, an "indirect effect," the damages suffered by the petitioners herein are essential to the cause of action and, under any fair interpretation, are direct effects of the allegedly negligent and tortious conduct of the respondents.

The only court which has considered the effect of the Restatement on the facts of this case has ruled that subsection (a) applies: "Under Section 18(a) an action for negligence and strict liability clearly qualifies." (Mem.Op. 16). The Ninth Circuit, in reversing the district court's holding, ignored entirely the applicable provisions of the Restatement and the fact that the "principles set forth in

Section 18" have been specifically recommended by Congress as a guide to the interpretation of the "direct effect" clause. House Rep. at 6618.

Restatement § 18 sets one standard for torts and crimes (subsection a) and a stricter standard for other actions (subsection b). But the interpretation of Judge Weinstein in *Harris* is that the direct effects clause embodies the principles only of subsection (b). He argues that the Congressional drafters, by employing the word 'direct,' meant to eliminate the distinctions between subsections (a) and (b) and thus the distinctions between crimes and torts on the one hand and all other actions. Instead of the two categories specified in the Restatement, all actions under the FSIA must satisfy the requirements of subsection (b). *Harris*, 481 F.Supp. at 1063.

This argument is unconvincing. Had Congress intended its use of the word 'direct' to so alter the traditional law of effects jurisdiction it would not have stated that its use of the phrase 'direct effect' was to be interpreted consistently with the principles of all of § 18 of the Restatement. It could have specifically referred to section 18(b) if, according to Judge Weinstein, that were the only section that could be relevant under the FSIA.[4]

Moreover, the distinction between the two subsections of § 18 of the Restatement is obviously justified on policy

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[4]As one commentator has noted, "The court's analysis is somewhat mystifying in light of § 18's unambiguous distinction between generally recognized torts or crimes and other acts. The *Harris* court begs the question when it states that Congress's use of 'direct' brings such cases within § 18(b) rather than § 18(a). The principle of § 18 as a whole determines whether the greater or lesser restriction shall apply, not a tenuous interpretation of the word 'direct'." Note, 14 Cornell Int. L.J. 97, 109-110, n. 63 (1981).

grounds: "[A] court will infer that a defendant who commits a generally recognized crime or tort has reason to foresee the natural consequences of his activity." Note, *Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum Contacts*, 14 Cornell Int. L.J. 97, 110 (1981). In the present cause, it is obvious that one in the business of manufacturing passenger aircraft, marketing and selling them to foreign purchasers, must be aware of the potential for wrongful death and property claims arising from a possibly defective aircraft. When a state engages in such manufacture, marketing, and sales, as has the Commonwealth of Australia herein, it must be presumed to possess the same awareness, and the Restatement is correct to require a lesser level of contact with the forum jurisdiction as a prerequisite to the assertion of jurisdiction than would be required in antitrust or securities actions.

Since a constituent element of both the wrongful death action of the Lynnes and of the product liability action of MAF occurred in the United States, the principle embodied in subsection (a) of the Restatement was completely fulfilled. The direct effect exception to sovereign immunity of § 1605(a)(2) is met in this case.

Subsection (b) of the Restatement:

A direct application of section 18 of the Restatement would end with consideration of subsection (a) since that clause so clearly deals with the tort problem posed by this case and because it is obvious that the requirements of the subsection are met on the instant facts. Since section 18 is written in the disjunctive, it is only necessary that a plaintiff satisfy one of the bases for jurisdiction set forth therein. (Mem. Op. 16) But petitioners contend that application of the second subsection also provides a basis for the assertion of subject matter jurisdiction.

In contrast to subsection (a) which specifically relates to criminal and tort actions, subsection (b) has been traditionally employed in resolving jurisdictional questions which arise in antitrust and securities cases. See, *e.g.*, *Timberlane Lumber Co., supra*, 549 F.2d at 610-612; *Travis v. Anthes Imp. Limited*, 473 F.2d 515, 528-530 (8th Cir. 1973). The subsection requires the presence of each of four factors. First, like subsection (a), the conduct and its effect must be constituent elements of activity to which the rule applies.[5] Second, the effect within the territory must be "substantial." Third, the effect must have occurred as a "direct and foreseeable result of the conduct outside the territory." Finally, the assertion of jurisdiction must not be "inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."

Unlike the *Harris* case, the Restatement does not indiscriminately mix the terms "direct", "substantial," and "foreseeable" as modifiers of "effect." Instead, each adjective is used in a manner that indicates that the Restatement drafters meant different things when they employed different language. This is significant when one considers Congress' decision to pattern the provision for effects jurisdiction under the FSIA after the Restatement. House Rep. at 6618. Congress did not, like the Restatement, require that the effect sufficient to justify assertion of jurisdiction under the FSIA be "substantial," though the Restatement employs that concept in providing for non-criminal and non-tort cases. Nor did Congress provide that the effect be "foreseeable," although, again, the Restatement uses that language. Instead, Congress stated that only one of the three types of effects recognized under international law

[5]It will be observed that if this factor is present, and if the case involves a crime or tort, then subsection (a) is satisfied, and there is no need for further analysis. Therefore, subsection (b) can only apply to cases which by definition are neither criminal nor tort.

must be present to satisfy the FSIA, and that effect is a "direct effect." Given this clear distinction in the two statutes, it is incredible that Judge Weinstein in *Harris* concluded that, "[A]s derived from section 18 of the Restatement (Second) of the Foreign Relations Laws of the United States direct effect refers to an effect which is both substantial and the direct and foreseeable result of conduct outside the jurisdiction." 481 F.Supp at 1063. Thus, a "direct" effect is one which is direct and then some. This is a novel approach to statutory construction, which generally posits that the decision to employ one word, and the corollary decision not to employ other available words, means that the rejected words are not intended. *Russello v. United States*, —— U.S. ——, 104 S. Ct. 296, 300 (1983). *Harris* rules precisely the opposite. Although the Restatement speaks of "direct," "substantial," and "foreseeable" effects, and although Congress only borrowed the single concept of "direct" effect in drafting the FSIA, *Harris* has held that the FSIA's direct effect is somehow a generic concept enveloping every type of effect of which the Restatement speaks. Under *Harris*, the FSIA "direct effect" is not only direct, it is also substantial and foreseeable.

Harris has had a substantial impact in later cases which have uncritically relied on its 'construction' of direct effect as meaning more than direct, *i.e.*, direct, substantial, and foreseeable. Judge Weinfeld of the Southern District of New York also held that the direct effects clause "can only be invoked when a *'substantial'* effect within the territory 'occurs as a *direct* and *foreseeable* result of the conduct outside the territory.'" *Verlinden, B.V. v. Central Bank of Nigeria*, 488 F.Supp. 1284, 1298 (S.D.N.Y. 1980), aff'd on other grounds, 647 F.2d 320 (2d Cir. 1981), rev'd on other grounds, —— U.S. ——, 103 S.Ct. 1962 (1983), quoting *Harris, supra*, 481 F.Supp. at 1062-63 [emphasis in *Ver-*

linden]. The only authority for *Verlinden's* conclusion is the demonstrably erroneous decision of Judge Weinstein in *Harris.*[6]

The Ninth Circuit has given further life to this faulty reading of the Restatement in both the present case and in *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir. 1984).[7] In both cases the court, in tort actions, has applied the broadened definition of the "direct effects" clause as derived from subsection (b) of the Restatement and has ignored subsection (a) of the Restatement (which, as demonstrated above, is the only subsection that can logically apply in a tort action) without any critical analysis beyond the rote citation of *Harris.*

Petitioners do not by the above argument concede that the direct effects which they suffered in the United States as a result of the actions of the respondents were not in fact "substantial" and "foreseeable" under the Restatement meaning. The district court fully addressed this issue in finding that this case satisfied the requirements of both sections of the Restatement, § 18:

> Section 18(b) is satisfied because the conduct and effect alleged by plaintiffs constitute elements of the alleged causes of action. The loss of a husband and father is "substantial" by any definition, as is the loss of MAF's airplane purchased at over four hundred thousand dollars. The harm suffered by plaintiffs was foreseeable. GAF sold the aircraft to MAF knowing that it would be used outside of the United States. It was foreseeable that if the aircraft was defective and unreasonably dangerous the destruction of the aircraft

[6]"Foreseeability and substantiality are required by neither the statute nor the nature of effects jurisdiction." Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L. Rev. 474, 505, n. 173 (1980).

[7]The discussion of the "direct effect" clause in *Berkovitz* is clearly dicta since that case initially held that plaintiff's claim did not derive from commercial activity in the first place and thus § 1605(a)(2) and the direct effects clause were improperly invoked.

> and the death of its pilot could result. Finally, there can be no more "direct" effect on a pilot's family than the effect resulting from the crash of a negligently designed and unreasonably dangerous aircraft.

(Mem. Op. 16-17).

The final argument which demonstrates the error of the Ninth Circuit opinion is a *reductio ad absurdum*: if the plaintiffs in the present action have not been affected in the United States by the commercial tort of a foreign sovereign committed abroad, who ever will be? The only way that the effect could be more direct is for the crash to have occurred in the United States, and this situation is separately provided for in § 1605(a)(2). The statute as now interpreted by the Ninth Circuit has been rendered nugatory. This cannot have been the intent of Congress in clearly specifying this theory of establishing liability, and in creating "a comprehensive set of legal standards governing claims of immunity *in every civil action against a foreign state* or its political subdivisions, agencies or instrumentalities." *Verlinden*, 103 S.Ct. at 1968 [emphasis added]. "[T]he legislative history does not indicate that direct effect jurisdiction should turn on the place of injury, despite the ease with which the drafters of the Act might have so indicated." Note, 13 N.Y.U.J. of Int.L. & Pol. at 597.

The Ninth Circuit's position allows foreign states to escape any tort liability for their commercial conduct no matter how negligent, culpable, or outrageous their acts may be so long as the injured American citizens die on foreign soil. As to property owners who suffer losses from torts abroad, the statute has been read out of existence. The Ninth Circuit has held that the fact that a $400,000 airplane may have been lost abroad due to another nation's tortious conduct has no effect on a corporation in America, no matter that the corporation might have to replace the plane, might have to indemnify others for the loss, might even

suffer a business reversal leading to insolvency. All of these effects are simply "indirect" under the Ninth Circuit view. 743 F.2d at 675. But it is clear that the corporation suffered no economic injury at the moment of the plane crash in Indonesia. It would only be later that recompense would have to be made. For instance, if the plane had been bought on credit, then the only injury suffered occurs at the point in time that they are required to make good on the outstanding payments. The place of injury rule in commercial cases is "a senseless factor upon which to base jurisdiction." Note, 13 N.Y.U.J. of Int.L. & Pol. at 598. Every injury for which the plaintiffs in this case seek recovery was suffered in the United States. This is precisely the sort of injury for which § 1605(a)(2) was designed to provide a remedy.

II.

THE IMPORTANCE OF THIS CASE REQUIRES REVIEW OF THE DECISION BELOW

The issues raised by the present petition highlight the unsettled nature of the law in this area and demonstrate the importance for this Court to review the instant case. Review on writ of certiorari is desirable in the present case due to the existence of two of the specific considerations governing review embodied in Rule 17 of the Rules of the Supreme Court: (1) "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter," and (2) a "federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." Rule 17.1(a)(c).

Conflict Among the Circuits:

There is a conflict among the circuit courts of appeal on the question of whether a plaintiff who has suffered damages in the United States from the act of a foreign sovereign

abroad has suffered a "direct effect in the United States" sufficient to satisfy that exception to immunity under the FSIA. 28 U.S.C. § 1605(a)(2). The Ninth Circuit in the present case and by dicta in the case of *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir. 1984), has held that plaintiffs who have suffered such damages are not directly affected by the action of the foreign sovereign. The District of Columbia Court of Appeals also appears to support this view. *Upton, supra, aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).[8]

Taking the contrary position is the Second Circuit. In the Nigerian cement cases, that court interpreted contracts for the purchase of cement which called for payment to be made in the United States. It was Nigeria's failure to make such payment, following a refusal of shipment in that country, which was held to have a direct effect on the American corporations who suffered financial losses thereby. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). The same rule obtains in the Eleventh Circuit, *Harris Corp. v. Nat'l. Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982), and the Third Circuit also appears to subscribe to this position. See, *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820, n. 13 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982); Note, *Establishing Jurisdiction Under the Commercial Activities Exception to the Foreign Sovereign Immunities Act of 1976*, 19 Houston Law J. 1003, 1004, n. 7 (1982).

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[8]But see *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-843 (D.C. Cir. 1984), holding that the commercial tort exception under the FSIA (§ 1605(a)(2)) is broader than the non-commercial tort exception for torts committed in the United States (§ 1605(a)(5)). This is inconsistent with the Ninth Circuit's holding that, in effect, the scope of both sections is the same since at least a part of the commercial tort must also, in the Ninth Circuit's view, occur in the United States.

The *Texas Trading* opinion contains the most thorough discussion of the issues involved in the assertion of jurisdiction over a foreign sovereign in the courts of the United States. This is understandable since the Second Circuit has issued more FSIA opinions than have all of the other federal circuits combined. See, Note, 19 Houston L. J., at 1004, n. 7. The opinion of the Second Circuit should be entitled to great weight in this area involving international commercial transactions. Because the opinion of the Ninth Circuit herein directly contradicts the law of effects jurisdiction as established by the Second Circuit, the present case should be reviewed by this Court in order that this conflict can be resolved.

"For obvious reasons, it is highly desirable to avoid circuit conflicts in the sensitive area of sovereign immunity." *Vencedora Oceanica Navigacion v. Compagnie Nationale*, 730 F.2d 195, 203 (5th Cir. 1984). The existence of this conflict among the circuits regarding the interpretation of the "direct effects" clause has been noted by many courts and commentators. In particular, the conflict between *Texas Trading* and the district court opinions on which the Ninth Circuit relies herein has been recognized. *Maritime Intern. Nominees v. Republic of Guinea*, 693 F.2d 1094, 1111 (D.C. Cir. 1982). See also, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 844 (D.C. Cir. 1984), Edwards, J., dissenting and concurring. Even an Australian commentator has noted the "rather divergent results" obtained by the American courts in interpreting the FSIA, Crawford, *A Foreign State Immunities Act for Australia?*, 8 Austral. Y.B. 71, 90-91, n.87 (1983).

To be sure, the Ninth Circuit has attempted to minimize the conflict between its holdings and those of the Second, Third, and Eleventh Circuits, but those efforts have been based on obvious misreadings of the facts. *Texas Trading* is said to be distinguishable because there, "no injury oc-

curred until the American companies were denied payment from a New York bank . . ." *Lynne*, 743 F.2d at 675. The fact that a "New York bank," Morgan Guaranty Trust, was involved is stressed three times. *Id.*, at 675. The Ninth Circuit is mistaken in its facts.

Some but not all of the cases ruled by the Second Circuit's opinion in *Texas Trading* involved payment through a New York bank. That decision decided four cases consolidated on appeal. In at least one of the other cases, *Chenax Majesty, Inc. v. Fed. Rep. of Nigeria*, there was no American bank involved. Rather, payment was to be made by letter of credit through a West German bank. 647 F.2d at 303. In any event, the role of the bank is insignificant: "As in *Verlinden*, Morgan Guaranty's role [in *Texas Trading*] was deemed insignificant to the jurisdictional inquiry." Note, 13 N.Y.U.J. of Int'l L. & Pol. at 591, n. 132.[9]

Subsequent cases arising from the same incident have also been decided consistently with *Texas Trading* although lacking the diacritical fact which the Ninth Circuit relies on. In *Reale Intern. Inc. v. Fed. Republic of Nigeria*, 562 F.Supp. 54 (S.D.N.Y. 1982), it was held that a direct effect was suffered in the United States by the breach of contract even though payment on the letter of credit could have been made through either a bank in the United States or one in Spain. *Id.*, at 56-57, relying on *Chenax*. Clearly, in all of the Nigerian concrete cases it is not the location of the financing bank which is relevant to the "direct effects" issue. Rather, it is the fact that American companies suffered undisputed financial losses because of the action of the State of Nigeria outside of the United States. "*Texas Trading*, [held] that financial loss to a United States corporation would satisfy,

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[9]Also, the significance of the location of the bank may be factually irrelevant. In *Verlinden, supra.*, 488 F.Supp. at 1284, it was noted that since Morgan Guaranty Trust was only a correspondent bank, its contacts could not be the predicate for jurisdiction. The same factual distinction is relevant to the *Texas Trading* cases.

without more, . . . the statutory requirement of a 'direct effect.'" *Wyle v. Bank Melli of Tehran, Iran*, 577 F.Supp. 1148, 1159 (N.D. Cal. 1983). The Missionary Aviation Fellowship, a United States corporation, has undoubtedly suffered a financial loss. This, without more, would satisfy the direct effects requirement in the Second Circuit. *Texas Trading, supra.*

The Ninth Circuit also errs in its attempt to reconcile its position with that taken in *In re Rio Grande Transport, Inc.*, 516 F.Supp. 1155, 1163-64 (S.D.N.Y. 1981). See *Berkovitz*, 735 F.2d at 332. *Rio Grande* is extremely close on its facts to the instant case. It appears to be the only other reported case in which a court has decided the "direct effects" issue in an action involving both property loss to a corporation and personal injury damages arising from the same event. The district court held that it had jurisdiction over both types of claims; over the property claims because the financial loss to the shipping company in the United States was a direct effect of a shipwreck abroad, and over the personal injury claims because they were pendent to the first claims. 516 F.Supp. at 1163-1164. The finding that the court had pendent jurisdiction over the death claims relieved it of the responsibility for determining whether the plaintiffs suffered any direct effects in the United States from their decedents' deaths abroad, but the Ninth Circuit derived a holding on this undecided issue from the *Rio Grande* case. *Berkovitz*, 735 F.2d at 332. Had the true holdings of *Rio Grande* been endorsed by the Ninth Circuit, as they were by the district court below (Mem.Op. 36, n. 17), then jurisdiction would have been found to hear all of the petitioners' claims in this present suit. But, even if *Rio Grande* is read as prescribing different results in property cases than in death cases, the Ninth Circuit has still erred in denying to all of the present plaintiffs jurisdiction to recover for their losses in this country.

The present Petition presents two discrete issues of subject matter jurisdiction under the FSIA. Petitioners contend that both issues should be decided the same: wrongful death claimants are as directly affected by torts committed abroad as are property claimants. But, whether this position is correct, or whether the two classes of claimants should be treated differently, or whether, as the Ninth Circuit has held, the claims of both classes should be rejected, it is clear that there is widespread disagreement on when and under what circumstances a "direct effect" is suffered in the United States from the commercial activity of a foreign sovereign abroad. For that reason, this petition should be granted and the decision below reviewed by this Court.

Importance of Unresolved Federal Question:

The present Petition, presenting a question of interpretation of the "direct effects" clause of the Foreign Sovereign Immunities Act, involves an unresolved question of federal law which this Court has not previously addressed. Although the specific question presented is one of interpretation under a federal statute, the resolution of the question will also have a significant impact on international law and on certain areas of procedure in the state courts.

One of the announced purposes of the Foreign Sovereign Immunities Act was to bring consistency and uniformity to the issue of when and under what circumstances foreign sovereigns may be sued in the courts of the United States. House Report No. 94-1487, p. 7 (1976), reprinted in [1976] U.S.Code Cong. & Ad.News 6604. This Court has previously noted that the Act also seeks "to clarify the governing standards" in this area of the law. *Verlinden B.V. v. Central Bank of Nigeria*, ——U.S. ——, 103 S.Ct. 1962, 1968 (1983).

The unusual importance of the sovereign immunity issue obviously derives from the nature of the defendant. Before the adoption of the FSIA, it was common for the state department to intervene in questions of immunity whenever

a foreign government was joined in a lawsuit in this country. Congress and this Court have both recognized the "potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." *Verlinden*, 103 S.Ct. at 1969, quoting H.R.Rep.No. 94-1487, at 32. The Ninth Circuit has in the present case, by adopting a position different from that of the Second Circuit, introduced an undesirable degree of uncertainty into this sensitive area of law and foreign policy. As such, the opinion below directly contravenes the goals of the FSIA. Instead of bringing regularity and uniformity to the law of sovereign immunity, the Ninth Circuit has created a dual system of law whereby a foreign sovereign is immune from the direct effects of its tortious conduct in some areas of the United States, but answerable in tort for the very same conduct in other areas of the United States. Indeed, it is quite easy to imagine this disparate treatment arising from a single incident such as a plane crash involving passengers from both New York and California. Unless this Court reviews the present case and provides a uniform answer to the question decided below, it would appear that the estates of the New York passengers could successfully sue the foreign state airline or aircraft manufacturer, while the survivors of the California passengers would be deemed, under the Ninth Circuit's view, to have suffered no direct effect from the deaths abroad. Similarly, the question of whether a corporation could recover for the loss of its aircraft abroad will turn on the wholly irrational fact of whether the corporation is located in New York or in California.

The FSIA is also unusual in that it prescribes the jurisdictional bases for sovereign immunity both in the state as well as the federal courts. 28 U.S.C. §§ 1602, 1604-1605. Therefore, the uncertainty created by the opinion of the Ninth Circuit in this case will be amplified by the course of future litigation in the states. Should the various state

courts consider themselves bound by the decisions of their respective federal circuits on this question, then a foreign sovereign will be amenable to suit in New York as well as in the Second Circuit, just as it will not be amenable in California as in the Ninth Circuit in any wrongful death case or other case with facts similar to the present one.

There is also the possibility that the state courts will interpret the federal statute differently and present the truly anomalous situation of a foreign sovereign being immune to suit in a particular federal circuit while amenable to suit in a state within that same circuit. Such incentives to forum shopping, while always undesirable, are wholly unacceptable when the defendant who may feel abused by the disparate legal rules is a foreign sovereign. For this further reason, the present case should be reviewed by this Court in order to bring American law into a consistent position on this sensitive question of jurisdiction and immunity in the area of foreign affairs.

This case also presents questions of unusual importance because of the subject matter of the suit: an airplane crash involving an aircraft manufactured by a state-owned manufacturing company. In a recent year, it was calculated that there were approximately one hundred major foreign air carriers and fifty major foreign air frame and component suppliers operating in the world. Cook, *Counting the Dragon's Teeth: Foreign Sovereign Immunity and Its Impact On International Aviation Litigation*, 46 Journal of Air Law & Commerce 687, 705 (1981). At least 37 of these foreign carriers appear to be wholly owned by a foreign state or are over 50% state-owned. *Id.*, at 705, n. 86. (See Appendix D) It is also common for foreign states to manufacture airplanes for both commercial and private use. *Id.*, at 706, n. 86. From these numbers alone, it is apparent that there is a very great potential for the reoccurrence of the exact conflict presented by the facts of the

present case. It is important that this case be heard in order that those who will potentially suffer liability under the FSIA be made aware of the exact nature of the liability imposed or assumed.

The failure to provide parties who have suffered damages in the United States with any opportunity for relief in the courts of this country, as the Ninth Circuit's opinion does, will have a substantial adverse affect on international trade and foreign relations. Indeed, the effect of the Ninth Circuit's decision will ultimately impact adversely on the Commonwealth of Australia in their business dealings. This consideration was specifically recognized by early critics of the United States' former policy of absolute immunity:

> To deprive parties injured in the ordinary course of trade of their common and well-established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands.

The Pesaro, 277 Fed. 473, 481 (S.D.N.Y. 1921), opinion later vacated, see *Berizzi Bros. Co. v. S. S. Pesaro*, 271 U.S. 562, 576 (1926). It is clear that problems of this nature, as well as the growth in the governmental conduct of commercial activities throughout the twentieth century, finally prompted the government of the United States to adopt the restrictive theory of sovereign immunity.

The present case well-illustrates the hardship foreseen by the court in *The Pesaro*. The Ninth Circuit has told the Missionary Aviation Fellowship, Inc. that even though the plane which Australia sold them may have been defective, no recovery can be obtained because the plane did not crash in the United States. But, had they purchased the plane

from a private manufacturer, they could have maintained suit in an American court wherever the plane may have crashed. Can there be any doubt that when MAF purchases a replacement aircraft they will not again make the mistake of purchasing the plane from a government manufacturer?

On the other hand, if this Court should review the decision of the Ninth Circuit and reverse its judgment, then the Commonwealth of Australia, as well as the numerous other state manufacturers of aircraft and other products, will be able to market their goods on an equal footing with private manufacturers. And, more importantly, unwary American purchasers of products manufactured abroad will not have their legitimate product liability claims defeated by the disingenuous argument that their substantial financial losses are not a 'direct effect' of the loss-producing event.

CONCLUSION

For the foregoing reasons, the petitioners, R. C. and Donna Lynne, and the Missionary Aviation Fellowship, Inc., pray that this Honorable Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the decision of the Ninth Circuit Court of Appeals, and reinstate the Order of the District Court for the Central District of California denying respondents' claims of sovereign immunity.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 83-6272

DC # CV 80-03198-CBM

AUSTRALIAN GOVERNMENT AIRCRAFT FACTORIES and THE COMMONWEALTH OF AUSTRALIA,

Petitioners-Appellants,

vs.

R. C. LYNNE, Executor and Personal Representative of the Estate of JIMMY SHERMAN LYNNE, Deceased; MISSIONARY AVIATION FELLOWSHIP, INC.; DONNA LYNNE, Individually and as Parent and Next Friend of KEVIN LYNNE and KURTIS LYNNE, Minors,

Respondents-Appellees.

OPINION

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding
Argued May 9, 1984
Submitted May 30, 1984

Before: ELY, TANG and BOOCHEVER, Circuit Judges.
TANG, Circuit Judge:

The Commonwealth of Australia and Government Aircraft Factories bring an interlocutory appeal of the district court's order denying their motion to dismiss for lack of subject matter jurisdiction, personal jurisdiction and improper venue. We reverse.

I.

Government Aircraft Factories, wholly owned and operated by the Department of Industry and Commerce of the Commonwealth of Australia, produces military and civilian aircraft for use throughout the world. In 1976, it leased one of its planes, a Nomad 22B, to Missionary Aviation Fellowship (MAF), a California nonprofit corporation that provides transportation and radio services to missionary operations in developing countries. In 1977, MAF exercised its option to buy the plane in Avalon, Australia.

On July 23, 1979, the plane crashed in Indonesia, killing its American pilot, J. S. Lynne.

MAF and Lynne's survivors brought an action in the Central District of California against Government Aircraft Factories and the Commonwealth of Australia alleging that the defendants were liable under strict liability and negligence theories for defects in the design, manufacture, testing, inspection, sale, and service of the aircraft. Lynne's survivors seek damages for wrongful death and MAF claims damages for the loss and destruction of the aircraft.

The defendants moved to dismiss the complaint for lack of subject matter jurisdiction, personal jurisdiction and improper venue, arguing that the Commonwealth and GAF, which is not legally distinct from the Commonwealth, are immune from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1976) (FSIA). They alleged that they lacked sufficient contacts with the forum for the assertion of personal jurisdiction and that venue was proper, if at all, in the district court for the District of Columbia.

The district court denied the motion to dismiss on June 24, 1983, and certified its order on August 19, 1983, for immediate appeal. This court granted permission for an interlocutory appeal under 28 U.S.C. § 1292(b).

II.

The Australian government contends that the district court erred in its conclusion that it could assert subject matter jurisdiction over this case under an exception to the general rule of foreign sovereign immunity. We agree.

Under the FSIA, a foreign sovereign maintains immunity from suit for its public acts but not for its commercial acts causing a direct effect in the United States. H. R. Rep. 94-1487, pp. 7-8, *reprinted in* 1976 Code Cong. & Ad. News 6605-06; *Verlinden v. Central Bank of Nigeria*, 103 S.Ct. 1962, 1968 (1983). The statutory scheme of the Act implements the doctrine of immunity but specifies several exceptions to the general rule of foreign sovereign immunity. 28 U.S.C. §§ 1605-07. If one of these exceptions applies, the district court may assert subject matter jurisdiction under the Act. 28 U.S.C. § 1330. The district court held that the exception codified in § 1605(a) (2) established the basis for subject matter jurisdiction. That section provides that a foreign state shall not be immune in any case in which the action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

Concluding that the death of the pilot and the damage to the plane overseas caused "direct effects" to the pilot's survivors and the California corporation which owned the plane, the district court held that it could assert jurisdiction over the case in accordance with § 1605(a) (2).

The commercial nature of the Australian government's decision to market its aircraft is not disputed. The issue before us is whether the injuries sustained by persons and entities inside the United States as a result of the plane crash abroad are sufficiently "direct" to fall within "direct effect" exception to the general rule of sovereign immunity.

This court has recently addressed the question of whether the effect on survivors of a death occurring abroad as a

result of a foreign sovereign's commercial activity constitutes a direct effect within the meaning of the FSIA. In *Berkovitz, v. Islamic Republic of Iran*, 735 F.2d 329, (9th Cir. 1984), an American citizen was murdered in Iran by an Iranian revolutionary group. His survivors brought an action against Iran for wrongful death, but the district court dismissed the case, concluding that Iran was protected by sovereign immunity. This court affirmed, holding that the FSIA exception for foreign actions abroad causing direct effects in the United States was not applicable. The court concluded that the direct effect of the Iranian action was the death of the victim inside Iran. The incidental effect on the victim's survivors in the United States, however, was insufficient to constitute a direct effect. " 'In such cases,' " the court observed, " 'the injury to the victim's bereaved relatives living in the United States is not sufficiently "direct" or "substantial" to support the assertion of Federal jurisdiction.' " *Id.* at 332 (quoting *Verlinden, B. V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1298 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 103 S.Ct. 1962 (1983). *See also Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979) (injuries to family of American killed in Moscow hotel fire not a "direct effect"); *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), *aff'd without opinion*, 607 F.2d 494 (D.C. Cir. 1979) (effect on family of American killed when Iranian Airport terminal collapsed not a "direct effect").

Berkovitz controls the disposition of this case. The direct effects of the plane crash in Indonesia are the loss of the pilot's life and the destruction of the aircraft. Under the reasoning of *Berkovitz*, the injuries to the pilot's family, though tragic and painful, are indirect consequences of the accident and thus cannot support the assertion of subject matter jurisdiction under the direct effect exception to foreign sovereign immunity.

Similarly, the property damage claim of Missionary Aviation Fellowship for the loss of the aircraft is an insuffiicient basis to assert subject matter jurisdiction under § 1605(a) (2).

MAF seeks to impose liability on the defendants for the losses sustained from its purchase of an allegedly defective aircraft. The financial loss it seeks to recover, however, is not sufficiently "direct" to overcome the general rule of sovereign immunity. The direct effect of the alleged misconduct was the destruction of the aircraft and the loss of its use when it crashed in Indonesia. The financial loss, including the cost of replacement, which was sustained in the United States by MAF is an indirect consequences of the plane's destruction and the loss of its functional use.

The plaintiff's reliance on *Texas Trading and Milling Corporation v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), is misplaced. There, American companies entered into contracts with Nigeria under which the companies would ship cement to Nigeria in exchange for payments to be received through a New York bank. When Nigerian ports became blocked, Nigeria repudiated the contracts and the companies sued. Nigeria claimed immunity under the Foreign Sovereign Immunities Act, but the second circuit, relying on the "direct effect" exception to sovereign immunity, held that the district court could properly assert subject matter jurisdiction over the case. 647 F.2d at 313. The court reasoned that the companies suffered a "direct" effect because "[t]hey were the beneficiaries of the contracts that were breached" and the Nigerian breach precluded payment in the United States through a New York bank. *Id.* at 312. The court did not have to decide whether an injury to an American corporation overseas would be sufficient in itself to cause an effect inside the United States. The court expressly left open the question of whether a company injured overseas suffers a direct effect *in the United States. Id.* at 312 n.5.

We conclude that the alleged injury here was not a sufficiently direct effect for the assertion of subject matter jurisdiction. Unlike *Texas Trading*, where no injury occurred until the American companies were denied payment from a New York bank as a result of Nigeria's repudiation of cement contracts, the direct injury to the American interest

in this case occurred overseas where the loss of the plane took place.

We conclude that the injuries alleged in this case were indirect effects of the plane crash overseas. Hence, the "direct effect" exception of 28 U.S.C. § 1605(a)(2) is not available to these plaintiffs to abrogate the general rule of foreign sovereign immunity. Because we conclude that the district court lacked subject matter jurisdiction under the FSIA, we need not address the personal jurisdiction or venue issues.

The order of the district court denying the motion to dismiss for lack of subject matter jurisdiction is REVERSED and the cause is REMANDED for entry of an order of dismissal.

DATED: September 21, 1984

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 80-3198

ORDER AND MEMORANDUM OPINION DENYING DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

R. C. LYNNE, Executor and Personal Representative of the Estate of JIMMY SHERMAN LYNNE, Deceased; MISSIONARY AVIATION FELLOWSHIP, INC.; DONNA LYNNE, Individually and as Parent and Next Friend of KEVIN LYNNE and KURTIS LYNNE, Minors,

Plaintiffs,

vs.

AUSTRALIAN GOVERNMENT AIRCRAFT FACTORIES and THE COMMONWEALTH OF AUSTRALIA,

Defendants.

This matter is before the court on defendants' motion to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction and for improper venue. The underlying lawsuit is based upon the crash of an Australian-made Nomad 22B aircraft, and the death of its pilot, Jimmy S. Lynne ("J.S. Lynne"). Plaintiffs allege that defendants are liable for the crash under either a negligence or strict products liability theory. They seek damages for wrongful death and the destruction of the aircraft.

Defendants Government Aircraft Factories ("GAF") and the Commonwealth of Australia claim that they are immune from suit under the doctrine of sovereign immunity, codified in the Foreign Sovereign Immunities Act of 1976

("FSIA"), 28 U.S.C. § 1602 et. seq.[1] Specifically, defendants argue that this court lacks subject matter and personal jurisdiction because plaintiffs' action does not come within any of the exceptions to immunity enumerated in the FSIA. Alternatively, defendants urge that venue is improper in this court and that the case should be transferred to the United States District Court for the District of Columbia.

Defendants' motion is denied on all grounds. In reaching its decision, the court was faced with difficult issues requiring interpretation of an act of Congress — the FSIA — that is as vaguely worded as it is complex. The court was also faced with issues that have not yet been addressed by the Ninth Circuit. The court believes, nevertheless, that its decision to exercise jurisdiction over defendants gives effect to the spirit and intent behind Congress' enactment of the FSIA.

BACKGROUND FACTS

Plaintiffs in the instant suit are Missionary Aviation Fellowship ("MAF"), a nonprofit California corporation that

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[1]H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6604 (1976) (hereinafter "House Report") accompanied the enactment of the FSIA. In the House Report, Congress explains that the intent of the Act is to codify.:

> the 'restrictive' principle of sovereign immunity, as presently recognized in international law . . . Under this principle, the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (juri imperii) and does not extend to suits based on its commercial or private acts (jure qestionis.) This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since . . . [I]t is regularly applied against the United States in suits against the United States government in foreign courts . . . [T]he bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts . . . A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. House Report at 6605, 6606.

provides air transportation and radio services for missionary programs to developing nations; R.C. Lynne, executor and personal representative of the estate of J.S. Lynne; and Donna Lynne, J.S. Lynne's widow, who sues in her individual capacity and as guardian of the decedent's two minor children. J.S. Lynne was an employee of MAF.

Defendant GAF is in the business of making airplanes. GAF is wholly owned by the Australian government.[2] GAF produces both military and civilian aircraft. The record is clear that GAF sells its airplanes all over the world. GAF manufactured the Nomad 22B aircraft that is the subject of this litigation.

According to defendants, GAF, on behalf of the Australian government, agreed on or about September 30, 1976 to lease the Nomad 22B to MAF for one year with an option to buy. Defendants allege that the negotiations for this lease took place in Fisherman's Beard, Australia. The aircraft was delivered at Avalon, Australia. MAF exercised its option to purchase the aircraft on September 1, 1977, in Avalon.

On July 23, 1979, J.S. Lynne was killed when the MAF-owned Nomad 22B he was piloting crashed somewhere near Langda Mission in Irian Jaya, Indonesia.

Plaintiffs contend that the crash of the aircraft and J.S. Lynne's death occurred as a result of defects and negligence in the design, testing, manufacture, inspection, sale and after sale service of the Nomad 22B. Plaintiffs further assert that jurisdiction and venue properly lie with this court, pursuant to the FSIA.

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[2]GAF claims sovereign immunity on the grounds that it is the same legal entity as the Commonwealth of Australia. GAF bases this contention on the fact it was formed by the Australian government primarily for national defense purposes, pursuant to that country's Supply and Development Act of 1939. Clearly, GAF's production of war planes are acts by a sovereign power. These are public acts under the FSIA. But GAF's sideline of selling non-military airplanes to private buyers throughout the world constitutes "commercial" activity and brings GAF under the jurisdiction of this court as provided for by the FSIA.

The task before this court is one of construction. The FSIA carves out broad exceptions to sovereign immunity where an American is involved in a suit arising out of the commercial activities of a foreign state.[3] The exceptions to immunity enumerated in the FSIA cover three basic situations out of which a lawsuit may arise and be properly heard in courts of the United States: where the suit is based on commercial activity in the United States; where the suit is based on an act in the United States that is itself based on commercial activity elsewhere; and finally, where the suit is based on an act outside of the United States in connection with a commercial activity elsewhere and that act has a direct effect in the United States. Section 1605(a)(2). Plaintiffs claim that their suit falls in this last category. This court agrees with plaintiffs. The basis for the court's decision is an inquiry that must begin with a careful reading of the FSIA itself.

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[3]The House Report indicates that Congress intended that "commercial activity" include

> a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A 'regular course of commercial conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a 'particular transaction or act.'
>
> [I]t is the essentially commercial nature of an activity or transaction that is crucial.
>
> The courts . . . have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill . . . Activities such as a foreign government's sale of a service or of a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing, or its investment in a security of an American corporation, would be among those included within the definition. House Report at 6614, 6615.

RELEVANT PROVISIONS OF TITLE 28, THE FOREIGN SOVEREIGN IMMUNITIES ACT.

Section 1330. *Actions against foreign states*

(a) The district courts shall have original jurisdiction without regard to amount in controversy for any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

Section 1602. *Findings and declaration of purpose*

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Section 1603. *Definitions*

For purposes of this chapter —

(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state' means any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States.

Section 1605. *General exceptions to the jurisdictional immunity of a foreign state*

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

....

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with the commercial activity of a foreign state elsewhere; or upon an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Section 1606. *Extent of liability*

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 . . . of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

SUBJECT MATTER JURISDICTION

Under the facts of this case, the relevant exception to sovereign immunity appears in section 1605(a)(2), *supra*. Clause three of this section denies immunity when the suit is based "upon an act outside the territory of the United States in connection with a commercial activity of the

foreign state elsewhere and that act causes a direct effect in the United States."

In order to assert jurisdiction under the FSIA, plaintiffs must make a threshold showing that defendants' activities giving rise to the suit are "commercial" in nature, as defined in section 1603(d). Here, it is beyond dispute that GAF's business of making and selling airplanes constitutes a "regular course of commercial conduct," and GAF's sale of the Nomad 22B to MAF constitutes a "particular commercial transaction or act." Therefore, the instant lawsuit arises out of defendants' "commercial activity" as defined in section 1603(d).

The court now faces the dispositive issue: whether defendants' activities giving rise to the suit caused a direct effect in the United States. The court must decide this issue separately as to plaintiffs' respective property damage and wrongful death claims. Is the loss to J. S. Lynne's family of a husband, father and provider a direct effect in the United States of defendants' alleged negligence? Does the financial loss suffered by MAF, an American corporation, from the destruction of its aircraft in Indonesia constitute a direct effect in the United States? This court concludes that both claims fall within the FSIA's exception to immunity. The Lynne family's wrongful death claim is by far the more difficult to apply under the direct effect clause. The court will address this issue first.

A. THE LYNNE FAMILY'S WRONGFUL DEATH CLAIM AND THE DIRECT EFFECT CLAUSE OF THE FSIA.

This court believes that defendants' alleged negligence in Australia, resulting in the crash of MAF's Nomad 22B and the death of J. S. Lynne in Indonesia, caused a direct effect in the United States such that this court has subject matter jurisdiction under the FSIA over plainiffs' wrongful death cause of action against defendants GAF and the Commonwealth of Australia.

Defendants argue that tortious acts or omissions by foreign sovereign states that cause injury or death to

American citizens abroad, do not have a direct effect in the United States. Defendants sieze upon the word "direct" and argue that the "direct" effect of their alleged negligence occurred in Indonesia where the plane crashed and J. S. Lynne died. Defendants view the loss thus incurred by the Lynne family — the loss of a husband and father —, and the damages sought for his wrongful death, as merely "indirect" effects. This court disagrees. Defendants' construction of "direct effect" is plagued by a logic of territorial limitation. This court believes defendants' construction is arbitrary and misconceived; it ignores the real, life-shattering effect suffered by a family of a person wrongfully killed. The effect on such a family is direct no matter where the death occurred. When, as in this case, the bereaved family lives in the United States, the direct effect of the death of a father and husband occurs in the United States.

Defendants are not without legal precedent for their restrictive interpretation of what constitutes a direct effect in the United States under the FSIA. Although the issue has not been addressed in this circuit, two federal courts have considered whether injury to an American abroad causes a direct effect in the United States, and have answered the question in the negative. *See Upton v. Empire of Iran*, 459 F.Supp 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979) and *Harris v. VAO Intourist, Moscow*, 481 F.Supp. 1056 (E.D.N.Y. 1979). Because these two cases are the only ones to address in the context of a suit for wrongful death what constitutes a direct effect under the FSIA, this court shall examine them in detail.

Upton involved an action for wrongful death, survival and personal injury brought in the United States District Court for the District of Columbia against the Empire of Iran and Iran's Department of Civil Aviation. The suit arose out of the deaths of two Americans and the serious injury of another when the roof of the main hall of the Mehrabad International Airport terminal building in Tehran, Iran, collapsed on them as they were awaiting departing flights. Plaintiffs charged defendants with negligence and strict

liability in tort, relying on section 1605(a)(2), cl. 3 of the FSIA. The dispositive issue before the court was whether or not defendants' negligent operation and maintenance of the airport terminal building caused a direct effect in the United States.

The *Upton* court answered this question in the negative. In doing so, the court relied on language in the House Report that accompanied the statute that describes the FSIA as a federal long-arm statute over foreign states, patterned after the District of Columbia's long-arm statute.[4] The court literally interpreted this reference and found that "causing injury to American citizens abroad is insufficient to satisfy the requirements of the District of Columbia long-arm statute." *Id.* at 266. The court also ruled that "mere ownership of an airport abroad does not establish sufficient contacts to satisfy [the minimum jurisdictional requirements] of *International Shoe.*" *Id.*[5]

The *Upton* court's definition of "direct effect in the United States" demonstrates an extremely restrictive view of causation — a view that this court believes is contrary to traditional American tort law. This is apparent in the *Upton* court's reasoning that any injuries suffered by plaintiffs in the United States caused by defendants' negligence in Iran were "indirect." In *Upton*, the "common sense" interpretation of a "direct effect" is "one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." The *Upton* court did not specify why plaintiffs' wrongful death claim did not fit this definition.

The narrow reasoning in *Upton* was followed by the *Harris* court. 481 F.Supp 1056. In *Harris*, suit was brought against two state-owned Soviet tourist services and the Soviet Union itself to recover damages for the alleged wrongful death of an American tourist in a Moscow hotel fire. The court

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[4]House Report at 6612.

[5]*International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

granted defendants' motion to dismiss on the grounds that it lacked subject matter jurisdiction because the action did not come within any of the exceptions to immunity enumerated in sections 1605-1607 of the FSIA.

The defendants in *Harris* had sufficient minimum contacts to satisfy the due process requirements of *International Shoe* for *in-personam* jurisdiction. But the *Harris* court was analyzing the subject matter jurisdictional provisions of the direct effect clause of the FSIA, and so correctly reasoned that:

> the essential factual issue is not the degree of oblique contacts of the National Hotel with the United States, but rather whether the allegedly negligent activity of the National Hotel had a 'direct effect' in the United States . . . Systematic and continuous contacts with the United States do not provide the grounds for finding an exception to the [FSIA] and a basis for jurisdiction.

Id. at 1060.

This court agrees with *Harris* that an *in-personam* analysis is improper under the direct effect clause. The subject matter jurisdictional inquiry must remain distinct from requirements of personal jurisdiction. Under the FSIA, standards for both subject matter and personal jurisdiction must be met. If the court finds it has subject matter jurisdiction — that is, if defendants' activities caused a direct effect in the United States — only then must the court proceed to evaluate defendants' contacts with the forum for the purpose of asserting *in-personam* jurisdiction as well. This distinction appears to be obscured in other portions of the *Harris* opinion.

Like *Upton*, *Harris* relied on interpretations given the District of Columbia long-arm provisions in its treatment of the direct effect clause of the FSIA. Curiously enough, the *Harris* court appears not to have considered the possible argument that the District of Columbia's long-arm statute would itself confer jurisdiction over a wrongful death

suit in this type of factual situation.[6] Instead, the *Harris* court held that "indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the 'direct effect' requirement of section 1605(a)(2)." *Id.* at 1062.

In reaching this conclusion, the *Harris* court emphasized Congress' intent that jurisdiction of the courts pursuant to the direct effect clause of the FSIA should be exercised consistent with the principles set forth in Section 18, Restatement of the Law, Second, Foreign Relations Laws of the United States. H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 13. *Harris* adopted language from the Restatement to define a "direct effect" as "an effect which is both substantial and the direct and foreseeable result of conduct outside the jurisdiction." *Id.* at 1063. The court apparently did

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[6]The long-arm provision of the District of Columbia statute, provides in pertinent part:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief from the person's—
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> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia; . . .
>
> (5) having an interest in, using, or possessing real property in the District of Columbia; or
>
> (6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing.

13 D.C. Code § 13-423 (1973).

See discussion, infra, suggesting application under section 13-423(a)(4) of the D.C. Code — tortious injury in the District . . . by an act or omission outside. This section provides for long-arm jurisdiction if certain contacts are present between the defendants and the forum.

not consider the nature of an effect that is "substantial" and "foreseeable," having previously concluded that it was dealing only with "indirect" effects. This court disagrees with the manner in which the *Harris* court applies the Restatement in interpreting the direct effect clause of the FSIA.

The court believes that plaintiffs correctly assert that in *Upton* and *Harris* the "direct effect" discussions are confused and intertwined with the issue of *in personam* jurisdiction. Part of the confusion is attributable to the wording and structure of the FSIA itself. The staute was aptly described by the Second Circuit as:

> a marvel of compression . . . Within the bounds of a few tersely-worded sections, it purports to provide answers to three crucial questions in a suit against a foreign state: The availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant.

Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 313 (2nd Cir. 1981), *citing* the House Report at 6611-12.

This court is of the opinion that *Upton* and *Harris* failed to distinguish between personal and subject matter juridiction, in applying the direct effect clause of the FSIA. *Upton* and *Harris* improperly relied on the District of Columbia's long-arm statute to interpret the subject matter — direct effect — provision at issue. The District of Columbia's long-arm statute is primarily concerned with personal jurisdiction, not subject matter jurisdiction.[7] In *Upton* the court clearly spoke in terms of personal jurisdiction when it found that "causing injury to American citizens abroad is insufficient to satisfy the requirements of the District of Columbia's long-arm statute . . . [and] . . . mere ownership

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[7]13 D.C. Code § 13-423 begins, "A District of Columbia court may *exercise personal jurisdiction over a person* . . ." (emphasis added).

of an airport abroad does not establish sufficient contacts with the district to satisfy *International Shoe*." 495 F.Supp 264, 266.

It is true in *Upton* that the court was without personal jurisdiction; the only contacts defendants had with the United States were the wrongful death and personal injury damages arising out of the collapse of the terminal building roof. But the court did not limit its holding to this issue. Instead, it interjected its finding of no personal jurisdiction into its interpretation and application of the direct effect clause of section 1605(a)(2).[8] The decision in *Upton* to grant defedants' motion to dismiss was correct, not because

[8]The court's determination of whether it has personal jurisdiction over the parties must remain distinct from the question of subject matter jurisdiction over the cause of action. This is evident in the House Report sections that discuss these two bases of jurisdiction under the FSIA. Congress' reference to the District of Columbia long-arm statute appears under the section entitled *Personal Jurisdiction* (p. 6612); section 1605(a)(2) cl. 3 — the direct effect provision of the FSIA at issue here — appears under the section entitled *Subject Matter Jurisdiction*. (p. 6611).

These two sections must be read together, but applied distinctly. This court interprets Congress' intent to be, simply, that if the act complained of is related to a commercial activity and that act has a direct effect in the United States, then the court has subject matter jurisdiction. Personal jurisdiction must also exist under the independent, due process requirements of *International Shoe*. The "direct effect" itself will not satisfy due process notions of *in-personam* jurisdiction. There must be other "minimum contacts." The FSIA and the District of Columbia statutes are identical on this point. The only difference is that the FSIA has one section, 1605(a)(2) cl. 3, that deals exclusively with subject matter jurisdiction, while section 13-423(a)(4) of the District of Columbia statute — granting personal jurisdiction when tortious injury occurs in the district by an act outside, if the actor has certain other minimum contacts with the district — collapses the notions of subject matter and personal jurisdiction into one clause.

The manner in which Harris and Upton apply the District of Columbia long-arm statute to the direct effect clause of the FSIA consists of a double application of a personal jurisdiction analysis. This is most evident in Harris, where the court held (1) sufficient minimum contacts existed for due process assertion of personal jurisdiction, but (2) the death of an American abroad does not constitute a "direct effect" in the United States under the FSIA.

defendants were immune from suit under the subject matter provisions of the FSIA, but because the court was without personal jurisdiction over the defendants as required by *International Shoe.*

The *Harris* court purports to make the crucial distinction between subject matter and personal jurisdiction, noting that the defendants clearly have sufficient minimum contacts with the United States to support a finding of personal jurisdiction. But then the distinction is obscured when the court relies on the restrictive interpretation — of *personal* jurisdiction — given the District of Columbia's long-arm statute to find that it is without jurisdiction over plaintiffs' wrongful death claim. This is most evident when the *Harris* court justifies its refusal to assert jurisdiction by citing Maryland, Virginia and District of Columbia cases wherein those courts rejected long-arm jurisdiction "when the only contact in the forum is an injurious consequence of an out-of-state act or omission." *Harris,* at 1064. These cases are inapposite. The *Harris* court itself found that the defendants had numerous and substantial contacts with the forum beyond the damages suffered by plaintiffs. Indeed, under

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The court reached the second half of its holding utilizing standards developed in cases construing the District of Columbia long-arm statute — a statute concerned with in-personam jurisdiction. This treatment represents a Catch-22 that Congress could not have intended.

This court believes it is incorrect under the FSIA to attempt to interpret the direct effect clause by way of the District of Columbia's or any other state's long-arm statute. State long-arm statutes are concerned with American federalism, not international relations. This court agrees with the Second Circuit in *Texas Trading & Milling, Corp. v. Federal Republic of Nigeria,* 647 F.2d 300 (2nd Cir. 1981), that when interpreting the words "direct effect,"

> [c]ourts construing either term should be mindful more of Congress' concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign sovereign, than with cases defining 'direct' or locating effects under state statutes passed for dissimilar purposes. Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention and the presence of attachable asses. Congress in the FSIA certainly did not intend significantly to constrict jurisdiction; it intended to regularize it.

the facts of *Harris*, the District of Columbia's long-arm statute, if applied, would have given the court jurisdiction.[9] Most long-arm statutes have provisions granting state courts jurisdiction where tortious acts occur outside that cause injury within a state, where the defendant has minimum contacts with the state. The *Harris* court, however, appears not to explore this line of analysis. Instead, the court bifurcates the issue of personal jurisdiction, applying it correctly under the standards of *International Shoe*, but misapplying it to what should have been an analysis of subject matter jurisdiction under the direct effect clause of the FSIA.[10] This court respectfully disagrees with the reasoning employed and the conclusion reached in *Harris*.

In the instant case, the court is equally skeptical of defendants' argument that their alleged tortious conduct, resulting in the crash of the Nomad 22B and the death of J. S. Lynne, did not cause a direct effect in the United States. Defendants' basic argument — that the direct effect of their alleged tortious conduct occurred in Indonesia, the location of the crash — relies more on the logic of semantics than the logic of tort liability. To argue that liability should not attach under the FSIA because the effects on plaintiffs are only "indirect" suggests a simplistic view of cause and effect that this court cannot share. Nor does this court believe that Congress intended to engage in such a fine distinction by inserting the word "direct" before "effect." Causation is an elusive concept. The word "direct" is itself relative; one is unsure where it falls in the chain of cause and effect.[11]

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[9] *Texas Trading* at 312, citing House Report at 6605-6606.

[10] *See* n.6, *supra*.

[11] *See* n. 8, *supra*.
For example, one could argue that the "direct" effect of defendants' alleged negligence occurred in Australia where the plane was built and the actual negligent acts, if any, took place. This would be an argument of questionable validity, however, because substantive tort law is more concerned with the locus of the injury than with the locus of the act causing the injury. In the instant case, this court is of the opinion that, even though J. S. Lynne's death occurred in Indonesia, the injury to his family occurred in the United States. Thus, with respect to plaintiffs' wrongful death cause of action, defendants alleged negligence had a "direct effect" in the United States.

Congress intended to limit the scope of subject matter jurisdiction to some extent. It is the finding of this court, however, that Congress did not intend to limit the scope of the direct effect clause to the extent that defendants urge. Any such intent would have to be manifested with greater articulation than the meaning this court is able to glean from a single word. In the absence of clear legislative direction, this court believes its decision to reject defendants' argument is in keeping with Congress' basic intent that the act is to provide a forum in United States courts for suits by United States citizens against foreign states.[12]

The court finds merit in plaintiffs' argument that if it were to adopt defendants' narrow view of what constitutes a direct effect under the FSIA, this clause would be rendered meaningless. The direct effect clause states that a foreign state will not be immune from jurisdiction of courts of the United States "*in any case* . . . in which the action is based . . . *upon an act outside the territory of the United States* in connection with a commercial activity elsewhere and *that act causes a direct effect in the United States* . . . "*Id.* (emphasis added). This language explicitly requires that the act and the commercial activity occur outside of the United States. Therefore, the liability elements of the cause of action must take place outside of the United States. The losses or damages suffered in the United States are the only effects that can be caused by the covered acts. Plaintiffs correctly assert that the only way the effect could be more direct would be if the crash occurred in the United States. This is provided for separately in section 1605(a)(2) of the FSIA.

Congress provides some insight into how this court should interpret and apply the term "direct effect" in the House Report accompanying the FSIA. There, Congress states that

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[12]House Report at 6604-6605. *See also Sugarman v. Aeromexico, Inc.* 626 F.2d 270 (3rd Cir. 1980); *Verlinden v. The Central Bank of Nigeria,* 488 F.Supp. 1284 (S.D.N.Y. 1980).

"direct effect" is meant to embrace: "commercial conduct abroad having direct effects within the United States which subject such conduct to the exercise of jurisdiction by the United States consistent with the principles set forth in Section 18, Restatement of the Law, Second, Foreign Relations Laws of the United States (1965)."[13] This court previously noted that the *Harris* court only summarily considered the Restatement in rendering its restrictive interpretation of the direct effect clause. Inasmuch as this court is of the opinion that the Restatement supports its finding that defendants' alleged negligence did have a direct effect in the United States, the Restatement will be examined in greater detail.

Section 18 of the Restatement provides:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurred as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Under section 18(a), an action for negligence and strict liability clearly qualifies. Section 18(b) prescribes a stricter standard; however, the disjunctive "or" that separates Sections 18(a) and (b) must be read to mean that if the first section is satisfied, the second need not be. Nonetheless, plaintiffs' action satisfies the requirements of either section.

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[13]House Report at 6618.

Section 18(b) is satisfied because the conduct and effect alleged by planitiffs constitute elements of the alleged causes of action. The loss of a husband and father is "substantial" by any definition, as is the loss of MAF's airplane purchased at over four hundred thousand dollars. The harm suffered by plaintiffs was foreseeable. GAF sold the aircraft to MAF knowing that it would be used outside of the United States. It was foreseeable that if the aircraft was defective and unreasonably dangerous the destruction of the aircraft and the death of its pilot could result. Finally, there can be no more "direct" effect on a pilot's family than the effect resulting from the crash of a negligently designed and unreasonably dangerous aircraft.

Although the concept of "direct effect" remains elusive, the evaluation of "causes," "effects" and "consequences" is not new to the law. They have been given considerable attention in tort law, especially where the cause of action is based upon negligence. Discussing "direct causation," which is considered a more restrictive alternative to foreseeable consequences, Professor Prosser states:

> 'Direct' consequences are those which follow in sequence from the effect of the defendant's act upon conditions existing and forces already in operation at the time, without intervention of any external forces which came into active operation later . . . There is an analogy to knocking over the first of a row of blocks, after which all of the rest fall down without the assistance of any other force . . . so long as new forces do not intervene.[14]

Under the facts of this case, defendants' alleged negligence appears to have the "direct consequence" of killing J. S. Lynne. The effect on J. S. Lynne's family is also a direct consequence of defendants' alleged negligence. Plaintiffs' cause of action in wrongful death is the legal consequence of defendants' conduct. To analogize to Professor Prosser's

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[14]Prosser, Handbook of the Law Of Torts, 263 (1967).

falling blocks, the legal effect and the physical effect of defendants' alleged negligence are two sides of the same block. A cause of action for wrongful death vested in Donna Lynne the instant her husband was killed.

Similarly, the legal concept of "proximate cause" is of central importance in the court's interpretation of the meaning of direct effect under the FSIA. One respected commentator describes the doctrine in the following terms:

> The breach of duty — the negligent act or omission — must be the 'proximate' cause [termed 'legal cause' in the Torts Restatement] of the plaintiff's injury.
>
> The first element of legal [or proximate] cause is *cause in fact*: i.e., it is necessary to show that the defendant's negligence contributed in some way to the plaintiff's injury, so that "but for" the defendant's negligence the injury would not have been sustained. If the accident would have happened anyway, whether the defendant was negligent or not, then his negligence was not a cause in fact, and of course cannot be the legal or responsible cause. The 'but for' rule has traditionally been applied to determine cause in fact.
>
> Where, subsequent to the defendant's negligent act, an independent intervening force actively operates to produce the injury, the chain of causation may be broken . . . If the risk of injury might have been reasonably foreseen, the defendant is liable, but . . . if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen and hence not foreseeable, it is a *superseding* cause, and the defendant is not liable.

4 Witkin, Summary of California Law, 2901-2910 (citations omitted).

It is clear to this court that if defendants in the instant case were negligent as plaintiffs claim, then their negligence was the proximate cause of the crash of the aircraft and J. S. Lynne's death. Substantive tort law would hold defend-

ants liable to J. S. Lynne's family because the injuries they suffered, and will continue to suffer, from J. S. Lynne's death were *also* proximately caused by defendants' same acts of negligence. In no sense is the cause of plaintiffs' wrongful death injuries from intervening or superseding elements. Defendants' negligence would seem to be the cause in fact of plaintiffs' injuries. But for defendants' negligence the Lynne family would not have suffered the loss of J. S. Lynne.[15]

This court finds it conceptually impossible to think of plaintiffs' injuries as an indirect effect of defendants' negligence, if defendants' negligence is the proximate cause of plaintiffs' injuries. If the effect is direct enough to constitute proximate cause and legal liability, it is direct enough to constitute "direct" within the meaning of section 1605(a)(2).

Thus, in terms of causation, injuries redressed in the wrongful death cause of action are no less direct than the actual death upon which the cause of action is based. If one negligent act can be the proximate cause of more than one injury — in this case, the death of J. S. Lynne and the pecuniary interest of J. S. Lynne's family — then more than one injury, to more than one person, can be the "direct effect" of a single negligent act. A negligent act that has the direct effect of killing a person has the additional direct effect of giving his beneficiaries a cause of action for wrongful death. Under the law, it is the same "direct effect." The location of the death is irrelevant under the FSIA; but extremely relevant is the location of the persons in whom

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[15]Defendants would also seem to be liable under the Restatement's formulation of causation and legal liability. The Restatement substitutes the words "proximate cause" with the term "substantial factor":

> To denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as the cause, using that word in the popular sense, in which there always lurks the idea of responsibility. Rest. 2d, Torts §§ 281(c), 430.

the cause of action accrues. J. S. Lynne's widow and children suffer the direct effect of his wrongful death in this country.

The law recognizes the cause of action for wrongful death for the very reason that the effect on plaintiff's life is so direct and so personal. In California, the wrongful death statute creates a new and independent cause of action in favor of the decedent's heirs and beneficiaries in which they recover the damages they have and will suffer by reason of the person's death. *Curry v. Fred Olsen Line*, 367 F.2d 921 (9th Cir. 1966). This cause of action does not derive from any rights the decedent may have had, but, as Professor Prosser states, "[t]he action proceeds on the theory of compensating the individual beneficiaries for loss of economic benefit which they might reasonably have expected to receive from the decedent in the form of support, services, or contributions during the remainder of his life-time if he had not been killed." Prosser, *supra* at 908. Also, pecuniary loss "may extend beyond mere contributions of food, shelter, money or property; and there is now a decided tendency to find that the society, care and attention of the deceased are 'services' to the survivor with a financial value, which may be compensated." *Id.* Thus, not only does the tortious conduct resulting in the death of an American abroad have a direct effect in the United States — legally manifested in a cause of action for wrongful death — but the direct effect is ongoing, measured by the jury over the decedent's life expectancy and even applied to such intangibles as lost consortium.

The court finds support for its decision today in *Texas Trading & Milling Corp v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981).[16] There the Second Circuit held

[16]For an interpretation of what constitutes a "direct effect" under the FSIA that is arguably consistent with this court's view, *see National American Corp. v. Federal Republic of Nigeria*, 448 F.Supp 622, 637-639 (S.D.N.Y. 1978) *aff'd*, 597 F.2d 314 (2nd Cir. 1979) (New York letter of credit payable through New York banks where beneficiary was a New York corporation met requirements of "direct effect"); *Yessenin-Volpin v. Novosti Press Agency, Tass*, 443 F.Supp 849, 855 (S.D.N.Y. 1978) (suggests injury in the United States to good name and reputation is a direct effect).

that, in a breach of contract action, financial losses that occur in the United States caused by a foreign sovereign's wrongful conduct in connection with its involvement in a "commercial activity" outside of the United States, constitute a "direct effect" in the United States under the FSIA, where corporations rather than individuals are involved.

The facts in *Texas Trading* centered upon contracts for the purchase and delivery of cement entered into by Nigeria with a large number of trading companies throughout the world, four of which were American. Financial arrangements consisted of letters of credit established by Nigeria with the Central Bank of Nigeria payable through Morgan Guaranty Trust Company of New York. Nigeria had contracted for more cement than it could possibly use. Its harbors became clogged with ships waiting to unload their cement cargos. Nigeria breached its contracts and instructed Morgan not to pay on any of the letters of credit. Numerous lawsuits followed.

The Court of Appeals held that: (1) jurisdiction existed under the FSIA over claims arising out of Nigeria's breach of contracts to purchase cement and breach of related letters of credit; and (2) Nigeria had sufficient contacts with the United States to permit the exercise of personal jurisdiction over it. Addressing the direct effect clause of the FSIA, the court cites *Upton* and *Harris* "for a pardigm of 'direct.'" The court then distinguished the case before it:

> Applying the term to a corporation is not so simple. Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss. Accordingly, the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a 'direct' financial loss. Here . . . breach of the cement contracts or breach of the letters of credit, [had a 'direct' effect on the suppliers]. They were beneficiaries of the contracts that were breached.

Texas Trading at 312.

The court further found that the direct effect occurred "in the United States," because (1) the cement breaches precluded cement suppliers from receiving payment in the United States and (2) the plaintiffs were American corporations.[17]

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[17]The *Texas Trading* court limited its holding to the finding that the "direct effect" of Nigeria's contract breaches occurred in the United States because the corporation's financial injury resulted from an American bank's refusal to honor Nigerian letters of credit. Since the parties' contract called for payment in the United States, this country became the location of the financial injury when payment was not forthcoming. The *Texas Trading* court expressly reserved judgment on whether an American corporation suffering financial injury *abroad* would also constitute a "direct effect" in the United States.

This issue was answered in the affirmative by the court in *In Re Rio Grande Transport, Inc.*, 516 F.Supp 1115 (S.D.N.Y. 1981). The case involved a collision on the high seas between two ships, one of which was owned by an American corporation. The American ship sunk. Its cargo was lost; a number of crew members were killed and others were seriously injured. The owner of the Algerian ship, a national corporation of the Republic of Algeria, anticipating various claims for wrongful death, personal injury and cargo loss to be filed against it, moved for summary judgment on the grounds of sovereign immunity. The district court relied on *Texas Trading* and held that the collision and sinking of the American ship had a "direct effect" in the United States because the ship's corporate owner was a New York corporation, the ship was its sole source of income and without it the corporation was unable to earn freight or other monies for a considerable period of time. *Id.* at 1163.

The *Rio Grande* court also held that once it found one "direct effect" sufficient to convey subject matter jurisdiction it had jurisdiction over all claims arising out of the collision; a direct effect need not be shown with respect to each individual claimant. The court reasoned that the FSIA intends that all claims arising out of the same transaction or occurrence be adjudicated in an American court once the court finds that it has jurisdiction over one claim. This court agrees with the court's approach in *Rio Grande*. This court finds that it has subject matter jurisdiction over all claims, because each independently constitutes a direct effect under the FSIA.

It is but a simple step to analogize the American corporate entity that suffers financial loss from a breach of contract to the American family that suffers the loss of a father and husband. Although the family's loss can be measured only by its pecuniary interest in the life of the deceased, money can never make it whole. The dollars and cents impact on a corporation from a breach of contract pales in comparison.

There is no question that the loss suffered by the Lynne plaintiffs occurred in the United States. Utilizing the exact logic of the Second Circuit in *Texas Trading*, J. S. Lynne's family was (1) to receive support, services and contributions from the decedent, which it was precluded from doing so by defendants' alleged negligence in the manufacture, sale and service of the Nomad 22B aircraft; and (2) each plaintiff is an American citizen.

This court agrees with the opinion rendered in *Texas Trading*. The court cannot, however, agree with the Second Circuit's approval of *Upton* and *Harris*, and the disparate treatment thereby afforded the American corporation over the American family. Justice demands equal treament. Congress could have intended no less. Furthermore, Congress certainly did not intend to undermine the wrongful death cause of action — a cause of action that was painfully slow in developing, but develop it did as mid-century society came to grips with accidental death caused by corporate indifference and neglect.[18]

Congress' purpose in enacting the FSIA was to regulate citizens' "access to the courts in order to resolve ordinary legal disputes," "arising out of their contact with foreign states and entities owned by foreign states." House Report at 6605. "The [FSIA] is not intended to affect the substantive law of liability." *Id.* at 6610. Therefore, this court concludes that Congress intended the FSIA to provide all American citizens, corporate and natural, with a means to redress the types of injury alleged in this action.

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[18]Malone, The Genesis of Wrongful Death, 17 Stan. L.Rev. 1043 (1965).

Specifically, this court finds that the FSIA confers upon it subject matter jurisdiction to entertain plaintiffs' wrongful death suit. The alleged negligence of defendants GAF and the Commonwealth of Australia, resulting in the death of J. S. Lynne outside of the United States, has a direct effect within the United States within the meaning of section 1605(a) (2).

B. MAF'S CLAIM FOR PROPERTY DAMAGES UNDER THE DIRECT EFFECT CLAUSE

This court also finds that it has subject matter jurisdiction over plaintiff MAF's claim for property damages caused by the destruction of its aircraft. In accordance with *Texas Trading*, the loss of MAF's aircraft — allegedly the result of defendants' negligence — caused a direct effect in the United States within the meaning of section 1605(a) (2).

PERSONAL JURISDICTION

A. STATUTORY PERSONAL JURISDICTION

Personal jurisdiction under the FSIA is governed by the provisions of section 1330(b). This section provides for personal jurisdiction over a foreign state as to any claim that the district court has subject matter jurisdiction pursuant to section 1330(a) "so long as service of process has been made under section 1608." *Texas Trading* at 313. Service of process is not an issue in this case. Therefore, the court, having determined that subject matter jurisdiction exists, satisfying section 1330(a), finds that statutory personal jurisdiction exists under section 1330(b).

B. CONSTITUTIONAL DUE PROCESS

The court's finding that statutory personal jurisdiction exists under the FSIA only begins the inquiry. Due process requires more. The assertion of personal jurisdiction over a non-resident defendant is constitutionally permissible only if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not

offend 'traditional notions of fair play and substantial justice.'" *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945). It is also clear that due process applies in suits where personal jurisdiction is asserted over foreign states. *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980); *See also, Texas Trading, supra* at 313, citing *Gonzalez. In personam* jurisdiction may be exercised over a non-resident defendant when that defendant's contacts with the forum have been either "substantial" or "continuous and systematic." *Insurance Company of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981); *Data Disc, Inc. v. Systems Technology Assoc.*, 557 F.2d 1280, 1287 (9th Cir. 1977); *International Shoe*, supra at 319.

This court evaluates GAF's nationwide contacts for the purpose of asserting personal jurisdiction. The court is not limited to defendants' contacts with the state of California. This is because when a federal statute authorizes worldwide service of process, the relevant contacts of an alien defendant are not limited to the forum in which the suit is brought, but may encompass the entire United States. *Wells Fargo and Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977) (dictum, citing 15 U.S.C. sections 22, 25, 77 78aa.) In actions brought pursuant to the FSIA, the Second Circuit has held that when service of process is made under 28 U.S.C. section 1608, "the relevant area in delineating contacts is the entire United States." *Texas Trading* at 314.

The court must analyze defendants' contacts with the United States based upon four separate determinations: (1) the extent to which the defendant availed itself of the privileges of American law; (2) the extent to which litigation in the United States was foreseeable to defendants; (3) the inconvenience to the defendants of litigating in the United States; and (4) the countervailing interest of the United States in hearing the suit. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1977); *Hanson v. Denckla*, 357 U.S. 235

(1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *International Shoe, supra.*

The following contacts clearly satisfy the above standards and demonstrate that GAF's relationship to the United States arising out of its business of selling aircraft is "substantial . . . continuous and systematic." *Marina Salina Cruz, supra,* and *International Shoe, supra.*

1) GAF sold the Nomad 22B to MAF with specific knowledge that MAF was a California based corporation. GAF's knowledge of this fact is evident in phone conversations and correspondence carried on in the course of the negotiations surrounding the sale of the aircraft. It is further evident to this court that at least some portion of the negotiations culminating in the contract took place in California.[19]

2) In manufacturing the Nomad 22B, GAF purchased and installed major components made in the United States. The most significant American-made components were two aircraft engines, produced by the Detroit Diesel Allison Division of General Motors (Model 250-B17B), and two Hartzell propellers, made in Piqua, Ohio. GAF is clearly "doing business" in the United States in relationship to the manufacture of its Nomad 22B.[20]

3) The Nomad 22B was produced and certified in accordance with the Type Certificate Data Sheet issued by the Federal Aviation Administration ("FAA") and presumably necessary to render the aircraft eligible for sale in the United States. Also, the FAA issued Regulatory Dockets specifically relating to the Nomad 22B and defects in its manufacture. This is further evidence that GAF regularly does business in the United States and for that privilege must conform to United States laws. These Regulatory Dockets, entitled Airworthiness Directives, are issued pur-

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[19]*See* Exhibit A., Plaintiffs' Supplemental Response to Defendants' Motion To Dismiss Complaint (hereinafter "Plaintiffs' Response").

[20]*See* Exhibits N and O, Plaintiffs' Response.

suant to 14 C.F.R., part 39, under Title 14 (Aeronautics and Space) and require specific changes to be made due to unsafe conditions. There is evidence before the court that GAF responded to the FAA's Airworthiness Directives in its "Alert Service Bulletins," offering owners of aircraft new parts at "no charge" where the FAA mandates the change; these parts are provided through GAF's Nomad American distributions.[21]

4) GAF distributes the Nomad 22B and replacement parts through Hughes Aviation Service, Aircraft Sales Division, Las Vegas, Nevada. Hughes is GAF's nationwide sales and service facility for the Nomad 22B.[22]

5) GAF extensively advertises the Nomad 22B throughout California and the United States. Plaintiffs specifically draw the court's attention to advertisements in the national aircraft industry magazine, *Aviation Week and Space Technology*, wherein the following language appeared with pictures of the aircraft: "During the last decade, Nomads have flown on full-schedule service . . . in the U.S.A. — from Alaska through to Nebraska and the Caribbean . . . [The] Nomad Floatmaster shows its usefulness in and around the lake regions of North America." This is persuasive evidence that defendants intended to enter into the United States' market and take advantage of the commercial opportunities therein.[23]

6) Finally, the court considers an additional area of contacts defendants have with the United States arising out of their sale of the aircraft in question to MAF. This area centers upon the damages alleged by plaintiffs to have been caused by the defendants' negligence. By including MAF's claim of property damage and the Lynne family's claim of wrongful death in evaluating whether personal jurisdiction exists, the court is not confusing personal and subject matter

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[21] *See* Exhibits B and E through K, Plaintiffs' Response.

[22] *See* Exhibit M, Plaintiffs' Response.

[23] *See* Exhibits C and D, Plaintiffs' Response.

jurisdiction under the FSIA. The court simply believes that once subject matter jurisdiction is found, based upon damages that constitute a "direct effect in the United States," those damages can then again be evaluated in terms of asserting personal jurisdiction. Such damages alone may not be sufficient contacts for the assertion of personal jurisdiction. Personal jurisdiction clearly lies, however, when these damages are evaluated in conjunction with defendants' other forum contacts. This analysis is in keeping with traditional long-arm, *in personam* inquiries.[24]

Defendants' contacts with the United States and this court's assertion of personal jurisdiction over defendants easily meet the four part constitutional standard enunciated above. First, defendants availed themselves of the privileges of American law. Defendants abided by FAA regulations and took advantage of the United States market. Second, it is reasonable to hold that it was foreseeable to defendants that their extensive, purposeful business activity in California and the United States would become the subject of litigation, thus requiring their presence before a court of the United States. *Worldwide Volkswagen, supra.* Third, the court finds that GAF and the Commonwealth of Australia will be little burdened in defending plaintiff's suit in this court. On this point, the Supreme Court commented in

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[24]*See* n.11, supra, setting forth the District of Columbia long-arm statute. 13 D.C. Code § 12-423(a)(3) provides for jurisdiction when injury is caused within the district by a tortious act outside. *See* also, section 410.10 of the California Code of Civil Procedure, which states in its entirety: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." In the Judicial Council's comment accompanying the statute, No. 9 addresses "Causing Effect in State by Act or Omission Elsewhere":

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action arising from these effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable. Hanson v. Denckla, 357 U.S. 235 (1958) and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

Worldwide Volkswagen that "modern transportation and communication have made it much less burdensome for a party to defend himself in a state where he engages in economic activity." *Worldwide Volkswagen* at 293, *quoting McGee v. International Life Insurance Company* at 222-223. Unlike the defendants in *Worldwide Volkswagen*, defendants here are clearly engaging in business activity in California and the United States with manufacturers, distributors, advertisers and purchasers of their aircraft.

Finally, a court of the United States has a significant interest in hearing this suit. This interest is underscored by Congress' purpose in enacting the FSIA: to codify the "restrictive" application of sovereign immunity and to provide American residents with "access to the courts" to resolve "ordinary legal disputes" arising out of their commercial interaction with foreign states. House Report at 6605. Furthermore, the Supreme Court has recognized a forum's "manifest interest in providing effective means of redress for its residents." *McGee* at 223.

At this stage of the proceedings, plaintiffs need make only a *prima facie* showing of jurisdictional facts to support this court's exercise of personal jurisdiction over defendants GAF and the Commonwealth of Australia. *Data Disc, Inc. v. Systems Technology Assoc.*, 557 F.2d at 1285. This court is convinced that plaintiffs have made more than a *prima facie* showing. Therefore, the court finds that its exercise of personal jurisdiction over defendants satisfies the constitutional due process requirements of *International Shoe*.

VENUE

Defendants' final contention is that even if the court does find that it has jurisdiction over the subject matter and parties of this action, venue properly lies in the District Court for the District of Columbia, and that the case should therefore be transferred. This court is not so inclined. The issue of venue under the FSIA has received scarce attention by the courts. However, this court finds that Congress'

intent is clearly manifested in the language of the FSIA, and in the House Report accompanying its enactment.

Venue under the FSIA is established by 28 U.S.C. § 1391(f). This provision states in pertinent part:

> A civil action against a foreign state . . . may be brought —
>
> (1) in any judicial district in which a substantial part of property that is the subject of the action is situated;
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> . . . .
>
> (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or
>
> (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision.

Defendants argue that GAF and the Commonwealth of Australia constitute the same legal entity under Australian law, and that, essentially, there is only one defendant in this suit, the Commonwealth of Australia. Defendants distinguish between a foreign state and an agency or instrumentality thereof, arguing that since GAF and the Commonwealth constitute the same legal entity, venue is only proper in the District of Columbia. The FSIA does not so hold. Even if defendants are a foreign state, section 1391(f)(4) does not mandate that the District of Columbia is the *only* judicial district in which venue is proper. Section 1391(f)(4) *allows* venue in the District of Columbia; it does not require it.

This interpretation renders the venue provisions of the FSIA internally consistent. Defendants construction ignores section 1391(f)(1). This section allows venue "in any judicial district in which a substantial part of the events or

omissions giving rise to the claim occurred . . ." Because the court believes section 1391(f) (1) applies to both foreign states *and* their agencies or instrumentalities, it is unnecessary to address defendants' argument that GAF and the Commonwealth of Australia constitute the same legal entity. The question, instead, is whether "a substantial part of the events or omissions giving rise to the claim occurred . . ." in this judicial district. The answer is yes.

Consistent with this court's previous discussion of subject matter jurisdiction, the court now finds that the injury suffered by MAF — the loss of its airplane and the financial damages thus incurred — constitutes "a substantial part of the events or omissions giving rise to the claim . . ." The court is guided to this conclusion by the House Report. Therein, discussing section 1391(f) (1), Congress states:

> This provision is analogous to 28 U.S.C. section 1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district in which 'the cause of action arose.' The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92 Congress, 1st session, which *does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated 'a substantial part of the events' giving rise to the claim.* (emphasis supplied).

This court has ruled in accordance with *Texas Trading*, 647 F.2d 300, that MAF's financial loss constitutes a "direct effect" within the meaning of section 1605(a) (2). The court further finds that the "direct effect" is located in MAF's state of incorporation, California. Venue properly lies in the Central District and with this court because MAF's principal place of business is in Fullerton, California.

In the interest of justice, convenience to the parties, and to avoid multiple lawsuits arising out of the same transaction or occurrence, the court also finds that venue is proper in this district as to plaintiffs' wrongful death claim.

CONCLUSION

The court, having considered the arguments and documents of counsel, and having found that it has jurisdiction over the parties and subject matter of this action, denies defendants' motion to dismiss the complaint. The court, having further found that venue is proper in this district, also denies defendants alternative motion to transfer plaintiffs' action to the District of Columbia.

IT IS SO ORDERED.

DATE: June 24, 1983

/s/
Consuelo B. Marshall, Judge
United States District Court

APPENDIX C

28 U.S.C. § 1330 provides:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c). For purposes of subsection (b), an apperance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1391(f) provides:

§ 1391. Venue generally

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated. If the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. §§ 1602-1606 provide:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter —

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d)

of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in

connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to —

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime

lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That —

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit — unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b) (1) of this section.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive

damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

APPENDIX D

Counting The Dragon's Teeth: Foreign Sovereign Immunity And Its Impact On International Aviation Litigation, 46 *Journal of Air Law & Commerce* 687 (1981)

[T]he following 14 foreign air carriers appear to be 100% state owned:

Arelinte Eireann	Ireland
Aeromexico	Mexico
Aero Peru	Peru
Air Canada	Canada
Air India	India
Air New Zealand	New Zealand
Argentine Airlines	Argentina
British Airways	United Kingdom
British West Indian	Trinidad and Tobago
Iran Air	Iran
Lan-Chile	Chile
Nigeria Airways	Nigeria
Olympic	Greece
Quantas	Australia

The following 14 foreign air carriers appear to be at least majority state-owned by the percentage shown:

Air France	France	98.55
Air Jamaica	Jamaica	60.00
Air Pacific	Fiji	60.69
Air Zaire	Zaire	64.00
Alitalia	Italy	75.50
Bahamasair	Bahamas	84.00
Dutch Antillean Air	Netherlands	96.00
Finnair	Finland	73.00
KLM	Netherlands	70.00
Lufthansa	Germany	74.31
Pakistan International	Pakistan	90.00
Royal Air Maroc	Morocco	67.73
Sabena	Belgium	65.00
Viasa	Venezuela	55.00

The following nine foreign air carriers appear to be over 50% state-owned, but their exact ownership interests are not clear:

Aeroflot	U.S.S.R.
Avianca	Columbia
Czechoslovak Airlines	Czechoslavakia
El Al	Israel
Iberia	Spain
LOT	Poland
South African Airways	South Africa
TAP	Portugal
TAROM	Romania

(46 J. of Air L. & Com. 687, 705-706, n. 86)

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No. 84-1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

R. C. LYNNE, Executor and Personal Representative of the Estate of Jimmy Sherman Lynne, Deceased; MISSIONARY AVIATION FELLOWSHIP, INC.; DONNA LYNNE, Individually and as Parent and Next Friend of KEVIN LYNNE and KURTIS LYNNE, Minors,

Petitioners,

v.

AUSTRALIAN GOVERNMENT AIRCRAFT FACTORIES and THE COMMONWEALTH OF AUSTRALIA

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the allegedly defective design, manufacture and service in Australia by the Commonwealth of Australia of an aircraft that crashed in Indonesia, killing the pilot, caused a "direct effect in the United States" within the meaning of the Foreign Sovereign Immunities Act ("FSIA") because the pilot's survivors are United States citizens.

2. Whether the allegedly defective design, manufacture and service in Australia by the Commonwealth of Australia of an aircraft that crashed in Indonesia caused a "direct effect in the United States" within the meaning of the FSIA because the owner of the aircraft is incorporated in the United States.

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IN THE

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OCTOBER TERM, 1984

No. 84-1014

R. C. LYNNE, Executor and Personal Representative of the Estate of Jimmy Sherman Lynne, Deceased; MISSIONARY AVIATION FELLOWSHIP, INC.; DONNA LYNNE, Individually and as Parent and Next Friend of KEVIN LYNNE and KURTIS LYNNE, Minors,

Petitioners,

v.

AUSTRALIAN GOVERNMENT AIRCRAFT FACTORIES and THE COMMONWEALTH OF AUSTRALIA

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California (Pet. App. B) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A) is reported at 743 F.2d 672.

JURISDICTION

The decision of the Court of Appeals was entered on September 21, 1984. A Suggestion for Rehearing En Banc was rejected on December 20, 1984. Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Pet. App. C. The key statutory provision is Section 1605 (a)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2).

STATEMENT

This case is an action in tort which was brought by petitioners against respondents for wrongful death and property damage. It arises from the alleged 1979 crash in Indonesia of a Nomad 22B aircraft manufactured, sold and delivered in Australia by the Commonwealth of Australia, which crash allegedly resulted in the death in Indonesia of the pilot Jimmy Sherman Lynne, a U.S. citizen. Petitioners are Mr. Lynne's estate; his survivors in the United States; and Missionary Aviation Fellowship ("MAF"), a California corporation with operations in Indonesia and the owner of the aircraft at the time of the crash. Respondents are the Commonwealth of Australia, which is a sovereign State, and the Australian Government Aircraft Factories ("GAF"). The GAF, which are maintained and operated directly by a department of the Government of the Commonwealth of Australia, manufacture and assemble aircraft and aircraft parts for the Commonwealth of Australia and for lease or sale to other parties. Although petitioners named the GAF as a party defendant, they are not incorporated by statute or otherwise and, under Australian law, they have no legal existence independent of the Commonwealth of

Australia (Appellant's Excerpts of Record (hereafter "R.") 35-37).

The GAF are not licensed, registered or incorporated to do business in any state of the United States. They manufacture no items, maintain no offices or warehouses, and have no bank account, telephone listings or employees in any U.S. state (R. 182-83, 190).

After negotiations in Fishermen's Bend, Victoria, Australia, the GAF agreed on or about September 30, 1976, to lease a Nomad 22B aircraft to MAF for one year with an option to purchase. MAF personnel from Indonesia informed the GAF that the Nomad 22B was to be used in Indonesia. All payments on the hire agreement were made from Indonesia and Papua New Guinea. The Nomad 22B aircraft was delivered to MAF at Avalon, Victoria, Australia (R. 36, 186).

Subsequently, the GAF agreed in Avalon, Victoria, Australia, to sell the aircraft, then located in Indonesia, to MAF. MAF paid the balance due on the purchase price of the aircraft from Indonesia. The contract of sale provided that it was to be construed in accordance with the laws of the state of Victoria, Australia and that any action arising therefrom was to be brought in the courts of that state (R. 36, 46, 187).

According to the Complaint filed by petitioners in the United States District Court for the Central District of California, Jimmy Sherman Lynne, the pilot of the Nomad 22B aircraft, died when the plane crashed in Indonesia on July 23, 1979, and the aircraft was destroyed (R. 4). The Commonwealth of Australia moved in the district court for dismissal of the Complaint on the grounds that subject matter jurisdiction was lacking under the provisions of the FSIA, that personal jurisdiction was also lacking, and that, even if jurisdiction existed, the venue was improper. The district court denied the motion to

dismiss on all three grounds. As to subject matter jurisdiction, it held that an exception to sovereign immunity had been established under the third clause of Section 1605(a)(2) of the FSIA because the crash of the allegedly defective Nomad 22B and the death of its pilot in Indonesia caused "a direct effect in the United States" with respect to the pilot's U.S. survivors and the U.S. corporate owner of the aircraft (Pet. App. B).

On respondents' request, the district court certified the matter for interlocutory appeal under 28 U.S.C. § 1292(b) to the United States Court of Appeals for the Ninth Circuit, and that court granted the permission to appeal. It then ruled that the injuries alleged in this case are indirect effects of the plane crash overseas. Hence, the "direct effect" exception of 28 U.S.C. § 1605(a)(2) was not applicable to abrogate the general rule of foreign sovereign immunity. The court thus did not reach the personal jurisdiction and venue issues (Pet. App. A-6).

ARGUMENT

Petitioners seek review in this Court of the Court of Appeals' ruling that the "direct effect" clause of the FSIA, 28 U.S.C. § 1605(a)(2), does not confer jurisdiction against the Commonwealth of Australia on the facts of this case, either with respect to the wrongful death or the property loss claims. The essence of petitioners' position is that a foreign sovereign may be sued in the United States under the FSIA in connection with any commercial activity and accident occurring abroad, so long as the plaintiff is a U.S. corporation or the survivor of a U.S. citizen injured abroad. Because Congress manifestly did not intend Section 1605(a)(2) of the FSIA to be construed in such an expansive fashion, the holding of the Ninth Circuit Court of Appeals is clearly correct. Moreover, it does not conflict with decisions of this Court or of other courts of appeals. The petition should therefore be denied.

1. The FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts. . . ." [1] Starting from the premise that a foreign state is normally immune from the jurisdiction of federal and state courts, the statute specifies limited exceptions to this general principle of immunity. 28 U.S.C. § 1604; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Petitioners acknowledge that the only possible basis for asserting subject matter jurisdiction against the Commonwealth of Australia in the circumstances of this case is the third exception to immunity listed in 28 U.S.C. § 1605(a)(2), relating to actions based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

The district court opinion in this case, upon which petitioners premise their arguments, adopted an unduly expansive and unprecedented reading of this statutory language in reasoning that the crash of the allegedly defective Nomad 22B and the death of its pilot in Indonesia caused a "direct effect in the United States" with respect to the pilot's U.S. survivors and the U.S. corporate owner of the aircraft. The district court relied on the U.S. nationality of the plaintiffs as a sufficient basis for sustaining jurisdiction over the foreign sovereign.[2] This view is patently contrary to the congressional mandate on the matter and was properly reversed by the Court of Appeals.

In applying the "direct effect" language, it is well settled that, as this Court recognized in the *Verlinden* decision, Congress intended the exceptions to immunity

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[1] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6610 (hereafter "House Report").

[2] *See, e.g.*, Pet. App. B-9.

in Section 1605 of the FSIA to be "substantive provisions requiring some form of substantial contact with the United States."[3] Indeed, the express congressional intent, no doubt because of international comity and foreign relations considerations, is that the requisite degree of contact be one "beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff."[4] This position is consistent with international law, under which jurisdiction based solely on the nationality of the victim—the "passive personality principle"—is not accepted as a basis for jurisdiction.[5]

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[3] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1983).

[4] House Report at 17, *reprinted in* U.S. Code Cong. & Ad. News at 6616. *See also Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 21 (1973) (statement of Charles N. Brower, Acting Legal Adviser, Department of State): "[O]ne of the principal objects of the statute is to avoid undue foreign relations problems . . . we want to be sure it is so drafted as to not raise new foreign relations problems." Congress clearly intended that the FSIA would make U.S. law consistent with international law. *McKeel v. Islamic Rep. of Iran*, 722 F.2d 582, 587-88 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 105 S. Ct. 243 (1984).

[5] *See Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. Supp. 435 (1935), *reprinted in* W. Bishop, *International Law* 553 (3d ed. 1971); Note, *Extraterritorial Jurisdiction Over Foreign States: The "Direct Effect" Provision of the Foreign Sovereign Immunities Act of 1976—Carey v. National Oil Corp.*, 13 J. of Int'l L. & Econ. 633, 646 & n.84 (1979) (hereafter *"Extraterritorial Jurisdiction"*); Note, *Foreign Sovereign Immunity—Territorial Jurisdiction—Non-Commercial Tort Exception to Foreign Sovereign Immunities Act Does Not Extend Domestic Jurisdiction To Acts Committed on U.S. Embassy Premises Abroad*, 24 Va. J. of Int'l L. 1013, 1019 (1984).

Section 30(2) of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965), which describes the circumstances under which a state has jurisdiction to prescribe a rule of law affecting foreign nationals, provides that:

[Footnote continued on next page]

2. The Court of Appeals correctly applied these precepts in applying the "direct effect" standard in this case. As to the wrongful death claim, it concluded, in reliance on its own recent decision in *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir.), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3403 (Nov. 27, 1984) (No. 84-484), and a chain of other precedents, that the injuries to the pilot's family were indirect consequences of the respondents' alleged misconduct and thus could not support the assertion of subject matter jurisdiction under the "direct effect" provision of Section 1605(a)(2) of the FSIA.

The thrust of the petition is that the Court of Appeals in this case and in *Berkovitz*, as well as the courts in *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979), and *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979), which reached similar results,[6] have all misconstrued the statutory phrase "direct effect." Petitioners urge that this common error stems largely from the courts' failure to interpret the phrase correctly in accordance with the principles set forth in Section 18 of the *Restatement (Second) of the Foreign Relations*

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[5] [Continued]

> A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.

By analogy, neither does a state have jurisdiction to enforce its laws as to a foreign state based solely on an effect on one of its nationals.

[6] *See also Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 n.35 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), in which the court found it "easy" to determine that the direct effect of an allegedly negligent act abroad that injures an American is the physical injury itself and not other consequences flowing therefrom; *Close v. American Airlines*, 587 F. Supp. 1062 (S.D.N.Y. 1984); *In re Disaster at Riyadh Airport*, 16 Av. Cas. (CCH) 17,880 (D.D.C. 1981) (R. at 251-53).

Law of the United States (hereafter "*Restatement*"),[7] as prescribed by the House Report on Section 1605(a)(2) (Pet. 10-11). Petitioners offer a lengthy but unpersuasive argument based on Section 18 of the *Restatement*.

For a number of reasons, Section 18 of the *Restatement* has not proven to be a significant help to the courts in applying the "direct effect" standard of Section 1605(a)(2) of the FSIA in the context of tort or contract actions against foreign sovereigns. First, neither subsection (a) nor (b) can be an appropriate guide because neither uses the phrase "direct effect."[8] Secondly, the "constituent elements" language which appears in both subsections (a) and (b) creates confusion because interpreting damages to be a "constituent element" of a

---

[7] Section 18 provides:

> Jurisdiction to Prescribe with
> Respect to Effect Within Territory
>
> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory, and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

[8] *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1063 (E.D.N.Y. 1979); *Extraterritorial Jurisdiction*, 13 J. of Int'l L. & Econ. at 645.

In its draft revision of the *Restatement*, the American Law Institute has embraced the *Upton-Harris* interpretation of the FSIA "direct effect" test. *Restatement of the Law, Foreign Relations of the United States (Revised)* § 453 and Reporters' Note 4 (Tent. Draft No. 2, 1981).

tort action would permit plaintiffs to assert jurisdiction solely on the basis of the victim's nationality—an assertion in conflict with principles of international law, a result which the drafters of Section 18 did not desire.[9] Under the circumstances, it is not surprising that the Second Circuit's opinion in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) called the discussion of the *Restatement* in the legislative history of the FSIA "a bit of a *non-sequitur*. . . ." Nor is it surprising that the Court of Appeals did not seek to undertake its analysis of "direct effect" with reference to Section 18 of the *Restatement*.

The petition maintains that to hold that there are no "direct effects" here would render the third clause of Section 1605(a)(2) nugatory (Pet. 20). The correct application of the "direct effect" principle, however, has been well documented in a number of situations involving torts, as well as contracts. One example was given in the congressional testimony of a State Department official on the Section 1605(a)(2) exception. He suggested that discharge of emissions from a factory outside the United States (*e.g.*, in Canada or Mexico) could cause a "direct effect"—pollution—in the United States.[10] Another example appears in *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978), in which

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[9] *Extraterritorial Jurisdiction*, 13 J. of Int'l L. & Econ. at 645-47. Other problems that have been raised about the aptness of the Section 18 formulation to the "direct effect" standard include the consideration that the section deals only with legislative (and not adjudicatory) jurisdiction, and that a new "balancing" approach to extraterritorial jurisdiction has developed since the enactment of the FSIA in 1976. Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 Colum. L. Rev. 1440, 1462 n. 98, 1463-64 (1983).

[10] *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 20 (1973).

libelous articles written outside the United States were deemed capable of causing a "direct effect" in the U.S. because they had been circulated to the public here. In each of these cases, unlike the instant case, the immediate impact—or "direct effect"— of an action initiated outside of the United States occurred within the U.S. Such holdings clearly were contemplated by Section 1605 (a) (2).

3. The Court of Appeals reasoned with respect to the claim of the corporate petitioner, MAF, as it had with respect to the claims of the pilot's survivors, that subject matter jurisdiction could not be asserted under Section 1605(a) (2) (Pet. App. A-5):

> The direct effect of the alleged misconduct was the destruction of the aircraft and the loss of its use when it crashed in Indonesia. The financial loss, including the cost of replacement, which was sustained in the United States by MAF is an indirect consequence of the plane's destruction and the loss of its functional use.

In their argument to the court below (as in their petition to this Court) the petitioners took the position that a contrary result should be reached on the basis of the reasoning of the Court of Appeals for the Second Circuit in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). As the court below correctly pointed out, however, *Texas Trading* left undecided the question of whether a U.S. company injured abroad suffers a "direct effect" in the United States because of the financial repercussions of the injury (Pet. App. A-5). *Texas Trading* involved actions for breach of contract, not for tort. Under those contracts, as the Second Circuit's opinion emphasized, U.S. cement suppliers were to present appropriate documents to, and collect payment from, banks in New York. The court expressly based its

holding that there had been a "direct effect" within the meaning of Section 1605(a)(2) of the FSIA on Nigeria's failure to pay the U.S. suppliers in the United States, and declined to rule on the "open question" of whether injury to a U.S. corporation overseas constitutes a "direct effect in the United States" under the statute.

Reale International, Inc. v. Federal Republic of Nigeria, 562 F. Supp. 54 (S.D.N.Y. 1982), upon which petitioners also rely (Pet. 24), is to the same effect. The district court, following the guidelines laid down by the Second Circuit in *Texas Trading*, observed that Nigeria and the Central Bank had given "unilateral instructions to Morgan [Guaranty Trust Company of New York] to stop processing payments under outstanding, advised letters of credit." 562 F. Supp. at 56. The court, in upholding jurisdiction, then reasoned that the "breach having been engineered and implemented by instructions given by the Central Bank to Morgan," it did not need to determine whether Section 1605(a)(2) would apply in a situation "that does not involve the use of American banking resources." 562 F. Supp. at 57.[11]

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[11] *See also Exchange National Bank of Chicago v. Empresa Minera del Centro del Peru, S.A.*, No. 83 Civ. 8287 (KTD), slip op. (S.D.N.Y. Sept. 6, 1984) ("direct effect" where promissory note was to be paid in New York) and *Transamerican Steamship Corp. v. Somali Democratic Republic*, 590 F. Supp. 968, 975-76 (D.D.C. 1984) ("direct effect" where plaintiff was forced to make payments in the U.S., U.S. banks transferred funds, and plaintiff also incurred additional charges in the U.S.). *Wyle v. Bank Melli of Tehran, Iran*, 577 F. Supp. 1148 (N.D. Cal. 1983), which is cited by the petition (Pet. 25), is not authority because it is a district court decision in the Ninth Circuit that preceded the decisions of the Court of Appeals for the Ninth Circuit in the instant case and in *Berkovitz*. Although petitioners note that the district court in *In re Rio Grande Transp., Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981), held that a U.S. corporation's property loss abroad caused a "direct effect in the United States" because the corporation suffered loss of income in the U.S., respondents submit that *Rio Grande* was decided incorrectly.

The ruling of the court below that there was no "direct effect" jurisdiction for MAF's property damage claim is manifestly consistent with the congressional intent in designing the FSIA. So as to avoid undue foreign relations problems and fashion an approach consistent with international law, the Congress meant the FSIA exceptions "to reflect a degree of contact [by a foreign sovereign with the United States] beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." [12] The FSIA's "direct effects" concept would be eviscerated if Section 1605(a)(2) were construed as conferring jurisdiction over foreign sovereigns for actions undertaken anywhere in the world so long as the aggrieved party is a U.S. corporation.[13]

Finally, logic dictates that a corporation must be deemed to have suffered the "direct effect" of a property loss at the situs where the property was damaged (in this case in Indonesia), not where the entity is incorporated. This position is supported by cases involving the application of long-arm statutes to foreign defendants allegedly causing property damage abroad, in which the courts have found that the place of injury is the place where the property was damaged and not the place where the corporation is incorporated or has its principal place of business. *See, e.g., Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1063-65 (3d Cir. 1982); *Dickson v. Hertz Corp.*, 559 F. Supp. 1169, 1173 (D. St. Croix 1983).

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[12] House Report at 17, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6616.

[13] Moreover, as one court has observed, "[t]hat corporations injured in their American pocket books by commercial activities of state trading companies occurring outside the United States would enjoy greater access to the American courts than personal injury or death claimants similarly injured would seem on initial examination to present a somewhat anomalous statutory construction." *Close v. American Airlines*, 587 F. Supp. 1062, 1065 (S.D.N.Y. 1984).

4. This review of the pertinent case law demonstrates that there is neither a conflict between federal courts of appeals regarding the "direct effects" issue as it is presented in this litigation, nor an important question of federal law which has not been, but should be, settled by this Court. Rules of the Supreme Court of the United States, Rule 17.1(a), (c). Petitioners posit the alleged conflict primarily on the position taken by the Court of Appeals for the Second Circuit in *Texas Trading*, but, as we have previously discussed, no conflict exists. The Second Circuit opinion is in accord with the position taken by the Ninth Circuit here as to the claims of natural persons, and it expresses no contrary view insofar as corporate claims are concerned.

The petition asserts that the Eleventh Circuit and the Third Circuit (in addition to the Second Circuit) have adopted a position contrary to that of the Ninth Circuit here (Pet. 22-23). In *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1351 (11th Cir. 1982), the Court of Appeals for the Eleventh Circuit held "direct effects" within the meaning of Section 1605(a)(2) to have been established because the disputed letter of credit arrangement extended into the United States. This decision relied on and went no further than the *Texas Trading* decision of the Second Circuit, and does not conflict with either the holding or the rationale of the court below. In *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3rd Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982), the Court of Appeals for the Third Circuit considered claims by seamen based on the Seaman's Wage Act, 46 U.S.C. §§ 596-97, against the owner of their vessel, an instrumentality of the governments of Algeria and Libya. The question of subject matter jurisdiction turned on the applicability of a different exception under the FSIA. The court sustained jurisdiction on the basis that the vessel had sailed into a United States port and became subject to the federal wage requirements by reason of this com-

mercial activity in the United States. Again, there is no conflict with the ruling of the court below.

In sum, the federal courts of appeals have not reached different conclusions in applying the "direct effect" language of Section 1605(a)(2) of the FSIA to wrongful death and property damage claims of the type involved in this case. The court below disposed of the issues correctly and in a manner fully consistent with the appellate body of law on the subject. There is no basis for granting certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

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